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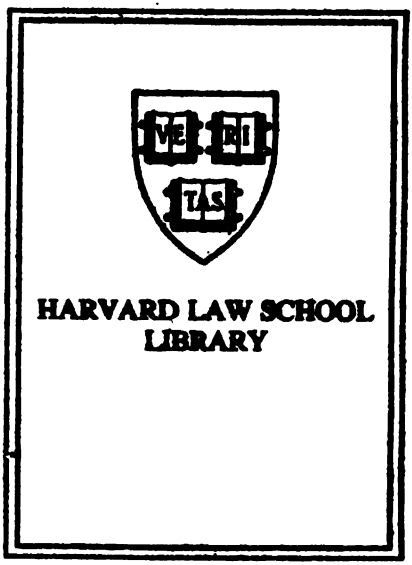
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REPORTS OF CASES

DECIDED BY THE

SUPREME COURT

OF

MISSISSIPPI,

AT THE

OCTOBER TERM, 1892, and MARCH TERM, 1893.

Vol. 70.

REPORTED BY

BRAME & ALEXANDER.

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OFFICERS OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. J. A. P. CAMPBELL,
HON. TIM E. COOPER,
HON. THOMAS H. WOODS, ... JUDGES.

HON. J. A. P. CAMPBELL, as his term is first to expire, is, by operation of law, chief justice.

FRANK JOHNSTON, ... *Attorney-general.*

L. BRAME,
C. H. ALEXANDER, ... *Reporters.*

OLIVER CLIFTON, ... *Clerk.*

FRANK JOHNSTON was appointed attorney-general January 23, 1893, *vice* T. M. MILLER, resigned.

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CIRCUIT JUDGES.

First District,	Hon. Newnan Cayce.
Second District,	Hon. S. H. Terral.
Third District,	Hon. Eugene Johnson.
Fourth District,	Hon. R. W. Williamson.
Fifth District,	Hon. C. H. Campbell.
Sixth District,	Hon. W. P. Cassedy.
Seventh District,	Hon. J. B. Chrisman.
Eighth District,	Hon. A. G. Mayers.
Ninth District,	Hon. J. D. Gilland.

Hon. Newnan Cayce was appointed February 18, 1893. Hon. Eugene Johnson was appointed September 24, 1892, *vice* Hon. James T. Fant, resigned.

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CHANCELLORS.

First District, ...	Hon. Baxter McFarland.
Second District, . . .	Hon. W. T. Houston.
Third District, . . .	Hon. B. T. Kimbrough.
Fourth District, . . .	Hon. Claude Pintard.
Fifth District, ...	Hon. H. C. Conn.
Sixth District, . . .	Hon. T. B. Graham.
Seventh District, . . .	Hon. W. R. Trigg.

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RULES

OF THE

SUPREME COURT OF MISSISSIPPI

IN FORCE OCTOBER 9, 1893.

1.

TRANSCRIPT—WHEN FILED.

In all cases brought to this court by appeal, the transcript of the record shall be filed in the clerk's office on or before the first day of the term, or time appointed for taking up the district to which the case may belong; and no transcript not filed by that day shall be received by the clerk unless ordered by the court upon affidavit showing good cause for such failure.

2.

TRANSCRIPT—HOW PREPARED.

Every transcript of a record brought to this court shall be distinctly and plainly written or type-written on paper not less than eight, nor more than eight and one-half inches wide, and fourteen inches long, on one side of every leaf; and each page shall be numbered at the bottom, in the left-hand corner, or at or near the center, and there shall be a blank margin at the top of not less than one inch, and on the left of not less than one-half inch, the paper to weigh not less than fourteen pounds to the ream. Transcripts may be type-written, on linen paper, to weigh not less than eight pounds to one thousand sheets. No carbon or other duplicates will be received, nor will transcripts written or type-written with copying ink be filed. Such transcripts, whether written or type-written, shall be prefaced by a suitable index, and shall

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be securely bound in non-flexible pasteboard covers, with marbled sides, in volumes of about an equal number of pages, not to exceed in any case two hundred and fifty pages in a volume, for the payment of which binding the appellant will be allowed sixty cents per volume, to be taxed with the costs. The appellant may cause the transcript to be bound as above described, or he may, at the time of taking his appeal, deposit with the clerk of the court from which the appeal is taken, a binding fee of sixty cents per volume of two hundred and fifty pages. In such case the clerk shall transmit the unbound transcript, with the binding fee, to the clerk of this court. Transcripts shall not be folded, but may be rolled for transmission if not bound as required; and, if not bound, the sheets shall not be fastened together. No transcript shall be taken from the clerk's office by any party or counsel until the same shall have been bound.

3.

TRANSCRIPT—WHAT TO CONTAIN.

A transcript shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions and the order, judgment or decree appealed from, unless the appellant shall, by writing, request other matters specified to be embraced in the transcript, a copy of which request shall be annexed to the transcript; and exhibits to declarations, bills, answers, depositions, etc., shall immediately follow the particular plea or deposition, first referring to them, and shall be copied but once. The several answers of witnesses as made in depositions shall each follow consecutively the particular interrogatory to which they are responsive; and no commission to examine a witness, nor certificate of a commissioner to a deposition, nor any proceedings to obtain such commission, shall be inserted in any transcript, except where a question as to the sufficiency or legality thereof appears from the record to have been decided; and no fee shall be allowed for any thing besides those matters required to be embraced in the transcript.

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4.

AGREED TRANSCRIPT.

By agreement of parties or their attorneys, made in writing and attested by the clerk of the court in which any cause may be pending or record existing (which agreement shall be filed and made a part of the transcript of such record), such parts of the record and proceedings as shall be so agreed shall constitute the transcript of the record to be brought to this court; and shall be certified as such and be considered a full transcript in this court for the consideration and final adjudication of the cause here.

5.

SUGGESTION OF DIMINUTION.

If a record be imperfect, diminution may be suggested by either party, and *certiorari* awarded; provided it be done in the first week of the term, or within four days after the assignment of errors is filed.

6.

RECORDS AND PAPERS—HOW FILED.

No record or other paper shall be considered as filed until so marked by the clerk—process of this court excepted—and the clerk shall indorse the date of filing.

7.

ASSIGNMENT OF ERRORS.

The appellant shall file on a separate sheet of paper a written or printed statement of the grounds or points of error relied on, before the call of the docket on the first day for it to be called in all cases where the transcript of the record is filed one week before that day, and within the first three days of the time for calling the docket where the transcript is filed within a week of the return-day for the appeal, or the case shall be dismissed; and no error not so distinctly assigned shall be argued by counsel or considered by the court.

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In appeals returnable at any time, the assignment of errors shall be filed two days before the hearing of the case, unless otherwise ordered by the court; and where the transcript is filed by order of the court after the return-day for the appeal, the assignment of errors shall be filed within two days after the transcript is filed.

8.

ABSTRACTS AND BRIEFS.

Before any cause will be taken upon submission or heard, the counsel shall furnish the court with a full abstract of all the material matters involved in the consideration of the cause, as they appear in the record, printed, or written in a plain and legible hand; and the counsel on each side shall also, at the time of the submission, file copies of their briefs, printed or written as aforesaid, containing the points and authorities relied on; and no case will be taken on submission, or considered by the court, unless the foregoing requisites be complied with.

9.

ARGUMENT.

Not more than two counsel on the same side, nor a longer time for argument than two hours on a side, will be allowed in any case unless by special leave of the court. Where there are two counsel on the same side, they may divide the time allowed for argument between themselves.

10.

PETITION FOR RE-ARGUMENT—SUGGESTION OF ERROR.

Applications for re-argument shall be presented in open court by petition, and noted on the minutes of the court on or before the Monday succeeding the delivery of the opinion; and no re-argument shall be granted upon any point or question not distinctly made and insisted upon at the original hearing or submission of the cause. No extension of the time for making such application will be granted except

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on account of sickness or other extreme cause. The court will, at any time during the term at which a judgment is rendered, consider a written suggestion of error of law or fact therein, and will take such action as may seem proper.

11.

PETITION FOR RE-ARGUMENT—EFFECT OF ADJOURNMENT.

Where an adjournment of the court shall preclude the required presentation of the petition for re-argument in open court, its presentation to the clerk, and his filing it within the time prescribed for presenting such petition to the court, shall stay all proceedings under the judgment until the next meeting of the court, when it shall be acted on by the court as if it had been presented to it when it was presented to the clerk, unless a majority of the judges of the court shall certify, in writing, to the clerk, prior to the next meeting of the court, that they have considered the application for a re-argument, and have determined to refuse it; and, on receipt of such certificate, such proceedings shall be had as if a petition for re-argument had not been presented.

12.

PETITION FOR RE-ARGUMENT—HOW PREPARED.

Petitions for re-argument must be signed by at least three members of the bar, who shall certify that they have carefully read and examined the record and the briefs of counsel, and have read the opinion of the court and the authorities cited, and are satisfied, from such examination and investigation, that such opinion is erroneous.

13.

RE-ARGUMENT—WHEN HEARD.

When a re-argument is ordered, the cause shall be placed at the end of the docket of its district, and heard at the same term.

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14.

PAPERS OUT OF OFFICE.

When a cause is regularly called on the docket for hearing, if the transcript of the record be not in court, the counsel to whom it is charged by the clerk shall pay a fine of twenty-five dollars.

15.

MOTIONS.

Every Saturday shall be motion-day; and if counsel be not present and have no brief filed when their motions are regularly called, such motions shall be dismissed; and no motion once disposed of or dismissed shall be again heard.

16.

MOTIONS DOCKETED—REASONS FILED.

No motion shall be heard unless it has been entered on the docket, and the reasons in support thereof filed with the papers on at least a half-sheet of paper, one entire day before it is called.

17.

MOTION TO DISMISS—WHEN WAIVED.

When a motion is made to dismiss, and counsel for the motion either withdraws it or suffers it to be dismissed for want of prosecution, it shall be considered a waiver of the defect on which the motion was based, unless it be so material that no judgment can be given.

18.

DISMISSED CAUSE—HOW RE-INSTATED.

No cause that has been dismissed shall be re-instated without an affidavit setting forth probable error in the proceedings.

19.

DOCKET—HOW CALLED—DELAY CASES.

At each term of the court the docket of each district shall be taken up in its order. But on regular motion-day, by

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motion entered for that purpose, causes may be submitted on a suggestion that they are brought here for delay, and if satisfied of the truth of such suggestion, the court will take up such causes first of their district, and make proper disposition of them.

20.

FAILURE TO PROSECUTE—CAUSE DISMISSED.

When any case shall be called for trial in its order, if no counsel appear and no brief be filed on behalf of the appellant, the cause shall be dismissed for want of prosecution.

21.

CALCULATIONS.

When a party relies on an excess in the calculation of interest or damages as a reason for reversing a judgment, a true calculation shall be presented to the court, in writing and figures, with a certificate by some counsellor not interested in the cause that the calculation is correct; and no such error will be noticed unless so presented to the court.

22.

AGREEMENT OF COUNSEL.

No agreement between counsel will be regarded unless reduced to writing and signed and filed by them.

23.

AUTHORITY OF COUNSEL—WHEN REQUIRED.

On motion supported by affidavit any counsel may be required to produce his authority, or show satisfactory evidence thereof, for prosecuting any appeal in this court; and, on failing to produce such authority or furnish such evidence, the appeal may be dismissed.

24.

STATE CASES—WHEN HEARD—ASSIGNMENT OF ERRORS.

The docket of criminal cases shall be taken up on the

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third Monday of the time for calling the docket of each district, and be proceeded with in order; and in such cases the assignment of error shall be filed at least one week prior to said time. Only cases in which transcripts of the record on appeal shall have been filed in this court shall be called, unless sixty days since the date of the certificate provided for by § 69 of the code of 1892, shall have expired, in which case they shall be called.

The attorney-general may, at any time, bring to the notice of the court any case in which the time for filing a transcript has expired, and move for affirmance of the judgment; and nothing herein contained shall extend the time when, under the law, transcripts should be filed in this court.

25.

WHEN APPELLEE MAY NOT WAIVE TIME.

After a case has been called on the docket, the appellee shall not be permitted to waive the time within which citation is required to be served, nor to enter his appearance for trial of the cause at that term.

26.

ATTORNEYS MUST BE ADMITTED TO PRACTICE.

Attorneys at law who have not been admitted to practice in this court, shall not be permitted to argue orally, or file briefs or *any paper* in any cause in this court.

27.

PAPERS NOT FILED AFTER SUBMISSION.

The clerk of this court shall not file with the papers of any cause in this court *any paper*, after the cause has been argued or submitted, except when permission has been given by the court; *provided*, that *briefs* may be filed *during* the day of the submission of the cause.

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28.

ORIGINAL PAPERS—WHEN CONSIDERED.

Whenever it shall, in the opinion of the judge or chancellor, be necessary or proper that original papers of any kind should be inspected in the supreme court, such judge or chancellor may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper; and such papers will be considered in connection with the transcript.

29.

WHEN RECORD FILED—CONTINUANCE.

If the transcript of the record of any case in which the judgment or decree appealed from is rendered thirty days before the return-day in this court, shall not be filed before the return-day, the case shall be continued, unless, before the expiration of three days after the filing, the appellee shall file with the clerk a written request for the case to be heard at that term.

30.

BILL OF EXCEPTIONS—HOW PREPARED.

The court will not accept as the bill of exceptions, in any case, a copy of the record of evidence made by the stenographer; but that record must be used merely as the basis for making up the bill of exceptions, as provided by law; and every bill of exceptions must be prepared according to the form of such bills before stenographers were provided for. Any case presented in disregard of this rule will be dealt with as if there was no bill of exceptions.

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CASES ARGUED AND DECIDED

—IN THE—

SUPREME COURT OF MISSISSIPPI

—AT THE—

OCTOBER TERM, 1892.

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W. W. GEORGE, EXECUTOR OF S. A. RAGSDALE, *v.* SALLIE A. HEWLETT.

1. INFANT. *Replevin for property sold. Defense. Estoppel.*

Where one, during infancy, sells personal property, receiving part of the price, and on attaining majority brings replevin for the property, and the suit is defended upon a general denial of his right to the property, it will not avail the defendant to show at the trial that there had been no formal renunciation of the contract of sale before suit.

2. SAME. *Placing in statu quo. Practice. Estoppel.*

Nor can the defendant, after such general denial of plaintiff's right, rely upon the defense that he had advanced, for the minor, money to pay certain storage charges on the property, and that plaintiff had failed to pay or tender him the amount before suit.

3. REPLEVIN. *Demand. General defense. Estoppel. Practice.*

Where one is lawfully in possession of personal property, having a charge upon it or the like, a demand by the owner is necessary to perfect his right to maintain replevin; but, when sued, if the defendant stands his ground, and contests the right of property in the plaintiff, he cannot afterward change his position and rely upon the want of demand, or other merely preliminary step, as a defense.

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Brief for appellant.

4. SAME. *Property destroyed by fire. Liability of sureties.*

In replevin for property wrongfully taken or withheld, where the defendant gives bond for its forthcoming, the plaintiff, on recovering, is entitled to judgment against the obligors on the bond for the value of the property, though, without their fault, it is destroyed by fire after the execution of the bond. *Whitfield* v. *Whitfield*, 44 Miss., 254, overruled.

FROM the circuit court of Lauderdale county.

HON. S. H. TERRAL, Judge.

The facts are stated in the opinion. Plaintiff had judgment in the court below. Motion for new trial overruled. Defendant appeals.

Walker & Hall, for appellant.

1. The court erred in excluding the evidence offered to show the destruction of the property by fire without the defendant's fault. *Whitfield* v. *Whitfield*, 44 Miss., 254; *Irion* v. *Hume*, 50 *Ib.*, 419; *Atkinson* v. *Foxworth*, 53 *Ib.*, 741. These cases hold that it is a good defense to establish the loss or destruction of property without the fault of the person having custody thereof.

Under the ruling of the court below, it would be perilous to either party to a suit to give bond for the forthcoming of property. It is to the interest of all concerned that one of the parties should give bond for property in replevin. The law encourages this. The party giving bond should not be placed in any worse attitude than the sheriff should the property remain in his hands. It will not be contended that the sheriff would be liable for property destroyed, without his fault, while in his custody.

2. If it be conceded that a defendant in replevin, having no shadow of right to the property, acts at his peril in giving bond for its forthcoming, yet no such case is presented here, for Mrs. Ragsdale was in no sense a *mala fide* holder. The property came lawfully into her possession, and she advanced the storage charges thereon. It was for plaintiff to relieve it from the burden of such charges by showing payment.

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Opinion of the court.

3. Plaintiff's minority would, at most, only make the sale to defendant voidable, and, until it was avoided, the possession of Mrs. Ragsdale was legal.

Mala fide holding could not be predicated of the facts of this case. Defendant had the legal as well as moral right to bond the property and litigate with plaintiff concerning it.

Witherspoon & Witherspoon and *E. H. Dial* for appellee.

The testimony offered by defendant was properly excluded. A replevin bond requires the return of property in as good condition as when taken. Wells on Replevin, § 422.

Destruction of the property does not shield the defendant if possession was wrongfully acquired, in violation of trust, or by fraud or force, or when characterized by tort. Wells on Replevin, §§ 455, 600; Sedgwick on Damages, 500; *De Thomas* v. *Weatherley*, 44 Am. R., 545 s.c. 61 Cal., 42.

There is a difference between the death of animals and the destruction of inanimate property in such cases. If an animal should die without fault of him who has it in possession, the same result would have followed if it had been in the possession of the owner. But this does not follow where property, bonded by a defendant, is destroyed by fire. In this case, if the defendant had permitted the property to be taken from the hotel, it would not have been destroyed.

The case of *Whitfield* v. *Whitfield*, 44 Miss., 254, relied on by appellant, was an action of detinue.

COOPER, J., delivered the opinion of the court.

This is an action of replevin, brought by the appellee against the testatrix of appellant, to recover possession of numerous articles of personal property, among which were a piano, piano stool and cover, a sewing-machine and a diamond ring. The articles, other than those specifically named, were delivered to the plaintiff upon her entering into bond, conditioned as the law directs. The officer failed to find the diamond ring, and, upon his return to that effect, the plaintiff counted in trover for said ring, under § 2619, code 1880.

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The piano, stool and cover and the sewing-machine were redelivered to the defendant upon her entering into the statutory bond, with sureties, for the forthcoming of the same to answer to such judgment as might be rendered. The plaintiff, having shown title to the property, secured a verdict and judgment for the property or its alternative value as assessed by the jury.

The following facts give rise to the errors assigned:

Mrs. Hewlett is the daughter of the testatrix, and the property sued for was, during her girlhood or at her marriage, presented to her by her father or mother. Soon after her marriage, and while she resided in Birmingham, Ala., she was adjudged insane, and committed to the lunatic asylum of that state. The piano and sewing-machine were left in storage in Birmingham during the time of Mrs. Hewlett's insanity. Upon restoration to sanity, she returned to the home of her parents, at Meridian, and directions were sent to the warehouseman to forward the articles to Meridian, and they were accordingly shipped, but were sent to Mrs. Ragsdale, the testatrix, instead of to Mrs. Hewlett. The reason given by the warehouseman for sending them to Mrs. Ragsdale was that he feared he would not receive his charges for storage if sent to Mrs. Hewlett. Mrs. Ragsdale paid these charges, something over six dollars, and the piano and machine were placed in Mrs. Ragsdale's house, of which Mrs. Hewlett was then an inmate.

Subsequently the mother and daughter disagreed, and the daughter left her mother's house. At or soon after this, there then being bitter feeling between them, Mrs. Ragsdale paid to Mrs. Hewlett some small sum of money, either fifteen or fifty dollars, in consideration of which Mr. Hewlett executed a bill of sale of the piano and machine to Mrs. Ragsdale. Mrs. Hewlett being, at that time, a minor, she afterwards, but without having formally repudiated the contract of sale, demanded possession of the property, which being refused, she instituted this suit. It was further shown on the trial

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that, pending the suit, the residence of the testatrix had been destroyed by fire, and the piano, stool and cover and the sewing-machine burned, without fault of the testatrix.

Upon these facts the appellant contends—

First.—That the plaintiff could not recover the property without a formal renunciation of the contract of sale, which was not shown.

Second.—That she was not entitled to the possession of the property without first having paid or tendered the storage charges paid by Mrs. Ragsdale.

Third.—That the loss by fire, without fault of Mrs. Ragsdale, of the piano, stool, cover and sewing-machine, discharged her of liability therefor.

We are of opinion that the defendant was precluded from making either of the defenses suggested in the first two assignments as above noted, by reason of having defended the suit upon a general denial of the plaintiff's right to the property. A demand by the plaintiff for the restoration of the property implied a repudiation of her contract of sale.

Where the defendant is lawfully in possession of property, a demand by the owner is necessary to perfect a right to sue; but if the defendant, being sued, stands his ground, and contests the right of property in the plaintiff, he cannot afterwards change his position and rely upon the want of demand in defense. Wells on Replevin, § 374.

For the same reason, the fact that Mrs. Hewlett did not tender the storage charges upon the articles was rendered immaterial. Mrs. Ragsdale, so far as appears by the record, made no claim for such charges; nor did she evidence any willingness to surrender possession upon payment thereof. Nor does it appear that the plaintiff knew that any charges had been paid by her. This defense is clearly an afterthought, interposed to defeat an impending verdict upon the real controversy between the parties.

The third position assumed by counsel presents a more substantial question, and one not free from difficulty in the

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light of former decisions of this court. We have, however, reached the conclusion that the court did not err as to the executor of Mrs. Ragsdale, in holding the destruction of the property not to operate as a release of her liability, even though it resulted from circumstances beyond her control, and without her fault.

In *Whitfield* v. *Whitfield*, 44 Miss., 254, it was held that the emancipation of slaves by the government precluded a plaintiff suing in detinue from recovering their value against the defendant in whose possession they were when freed. The court seems to have been controlled by the technical rules of the action of detinue, though much that is said in the opinion would be equally applicable to actions of replevin.

"We are of opinion," said Tarbell, J., who delivered the opinion of the court, "that the solution of this case is found in the divestiture of the plaintiff's title to the slaves by the sovereign authority, subsequent to the institution of the suit. Not only was the plaintiff divested of title, but the defendant was legally dispossessed of the property. This conclusion, we think, is founded in reason and justice, and may be sustained upon general principles, independently of adjudicated cases. Indeed, it is one of the peculiar features of the action of detinue, that when judgment is for the specific property, or its alternate value, payment of the value vests title in the defendant, which is defeated where title has passed to third parties, or, as in the case at bar, where title in either party is rendered impossible or illegal by operation of law."

It is apparently conceded throughout the opinion that if the loss or destruction of the property is caused by the fault of the defendant, the plaintiff may recover its full value, though it is manifest that, under such circumstances, there would be no title in the plaintiff at the time of trial, nor would payment of the judgment vest title to the property in the defendant. The whole argument of the court in this case, as also that of the supreme court of North Carolina in *Bethea* v. *McLennon*, 1 Iredell's Law, 523, which was so much relied

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on by Judge Tarbell, proceeds, upon what seems to us the radical error, of excusing the original wrong of the defendant in taking or withholding the property of the plaintiff by reason of the circumstances of the event by which the property is destroyed. The defendant is thus permitted to unlawfully keep the plaintiff out of possession of his own, and yet to cast upon him the risk of its destruction by natural causes or inevitable accident. It is to be noted also that the rule established applies only because of the technicalities of the action, and may be evaded by the plaintiff's dismissing the action of detinue, and counting in trover for the conversion of the property. If he pursues this course, the rule of damages, supposed to be founded in reason and justice, is dissolved, and the loss flowing from the destruction of the property is re-imposed upon the defendant.

In *Whitfield* v. *Whitfield* the controlling factor in the decision seems to have been that in detinue the plaintiff seeks to recover the specific thing, and damages for its detention, and but little force is given to the right also asserted in the suit to have the alternate value, if the thing itself cannot be recovered. We are unable to yield our convictions to the unsatisfactory and exceedingly technical reasoning of the court in that case. The decided weight of authority is against it, and "reason and justice" oppose it. Wells on Replevin, §§ 455, 601, and authorities there cited.

The cases of *Young* v. *Pickens*, 45 Miss.; *Irion* v. *Hume*, 50 *Ib.*, 419; and *Atkison* v. *Foxworth*, 53 *Ib.*, 741, stand upon totally different principles. They were cases of attachment or execution levied upon property, in which bonds had been executed for the forthcoming of the property and the property lost or destroyed without fault of the obligors. There was no precedent wrong or trespass by which the property was taken from the owner, and the liability of the obligors rested wholly upon *contract*, the performance of which having been rendered impossible, without fault on the part of the obligors, they were held to be

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discharged. It is quite a different thing to say, as was decided in *Whitfield* v. *Whitfield*, that inability to produce the property, the subject-matter of the litigation, excuses from liability for the precedent wrong of taking or holding it against the true owner. That case is overruled to the extent that it announces the rule of non-liability of the defendant to respond in damages for the value of the property lost.

Judgment affirmed.

NOTE.—This case was decided at the October term, 1890, and should have been reported in 68 Miss., but, through some inadvertence, it was omitted.

REP.

CAPITAL CITY OIL WORKS v. ARMISTEAD BLACK.

1. MASTER AND SERVANT. *Injury to servant. Contributory negligence.*

A servant who fails to use ordinary care in looking out for danger, and, as a consequence, is injured while in the discharge of a hazardous duty, cannot recover therefor on the ground that the master failed to use means to prevent the injury.

2. SAME. *Alleged negligence of master. Case.*

The president of an oil company ordered out a loaded car, and as it rolled down the side-track he called to several employes present to know if any of them could couple it, when plaintiff, one of the laborers, who had some experience in handling cars, ran ahead of the car to couple it to another, the president urging him on, and at the same time directing another employe, a boy, to put on the brake, which, however, was not done. Plaintiff supposed the speed of the car would be controlled, and did not look back. It ran with force against the other car just as he reached it, injuring his hand. *Held*, that, as he might have seen the danger of the undertaking by looking, he could not recover for the injury.

FROM the circuit court of the first district of Hinds county.
HON. J. B. CHRISMAN, Judge.

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Brief for appellant.

Action of damages by appellee against the appellant, an oil company. Plaintiff was employed as a laborer to shovel cotton-seed in the yard of appellant, in Jackson, Mississippi. While he was working in the yard with other laborers it became necessary to move a loaded car from the yard, and to have it coupled to another car which was standing on a side-track. The president of the company was present giving directions, and about the time the car started he called to the laborers present, saying, that if any of them understood coupling to go ahead and couple this car to the other. Plaintiff, who had some experience in handling cars, responded, and, as he started, the president urged him to hurry up, at the same time directing another employe, a boy, to apply the brake to this car, which was going down grade. Plaintiff supposed the speed of the car would be controlled, and ran forward without looking back, but the brake was not applied, and, just as he reached the other car, and put his hand on the link to make the coupling, the moving car came against it with force, and his hand was caught and badly injured. He was disabled from doing the regular work for which he had been employed, but the next morning after the accident he returned to the mill of appellant, and was put at light work, which he followed about two weeks, when he went to work regularly as before. He remained in the employ of the company for about twelve months, when he was discharged, after which he brought this action. On the trial the above facts, substantially, were shown. Defendant asked a peremptory instruction in its favor, which was refused, and plaintiff had a recovery for $350, hence this appeal.

Miller, Smith & Hirsh, for appellant.

1. Appellee was merely requested to couple the car, and was not commanded to do so. Hence his effort to make the coupling was purely voluntary, and he cannot recover. 2 Thomp. on Neg., p. 1017, § 21.

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2. But if the president's language can be construed as an order or command, plaintiff was not entitled to recover, and the peremptory instruction should have been given. It is no excuse that plaintiff was hurried. *Taylor* v. *Carew Mfg. Co.*, 140 Mass., 150; 14 Am. & Eng. Enc. L., 859, 862. His opportunities for observing the danger were equal to that of the employer; indeed, they were more ample. See *English* v. *Railroad Co.*, 24 Fed. Rep., 906; 2 Thomp. on Neg., § 7; *Warnell* v. *Railroad Co.*, 31 Am. & Eng. R. R. Cas., 272; *Atlas Engine Wks.* v. *Randall*, 100 Ind., 293 s.c. 50 Am. R., 798.

Calhoon & Green for appellee.

Where the master orders the servant into danger, or in a service other than that for which he was employed, his obedience will not be negligence, and in case he is injured in such an undertaking, the master is liable. Beach on Con. Neg., § 132. In such case, the law will not charge the servant with the assumption of the risk, unless the danger is so glaring that no sensible man would enter into it. 14 Am. & Eng. Enc. L., p. 857, § 14; *Railroad Co.* v. *Duffield*, 12 Lea (Tenn.), 63.

The authorities relied upon by appellant are not applicable, for in the cases cited the master was not personally directing the servant. The president of the corporation is the corporation in respect to his negligence. *Smith* v. *Iron Co.*, 42 N. J. L., 467. The undertaking to couple the cars was not *per se* negligence. Certainly it was not so glaringly dangerous as that no prudent man would undertake it. Beach on Con. Neg., § 135.

Argued orally by *M. Green*, for appellee.

CAMPBELL, C. J., delivered the opinion of the court.

The peremptory instruction asked by the defendant should have been given. A clearer case for such an one is rarely

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Statement of the case.

presented. On his own testimony, the plaintiff was not entitled to recover any thing. His misfortune was the result of his own stupid carelessness. He knew all and saw all, or might have seen if he used his eyes, that was involved in his undertaking to couple the cars, and rightly charged his injury to an accident such as not unfrequently befalls those whose business it is to apply brakes. His own contemporary view of the occurrence, as indicated by his acts, suggests his proper understanding that he had no claim on the defendant for damages, and that his action for them was the result of after-thought, born of his discharge from the service of the defendant. The thought of holding a private individual responsible in damages in such case would not arise in any mind. The just rights of corporations, under the law, must be as zealously guarded and protected by the courts as those of natural persons.

Reversed, and remanded for a new trial.

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ILLINOIS CENTRAL RAILROAD CO. v. H. K. BOEHMS.

PEREMPTORY INSTRUCTION. *When refused. Evidence to warrant verdict.*

Where the evidence is sufficient to warrant a verdict for the plaintiff in any view of it which may be legally taken, it is proper to refuse a peremptory instruction to find for the defendant, and a verdict for the plaintiff will be sustained.

FROM the circuit court of the first district of Hinds county.
HON. J. B. CHRISMAN, Judge.

Action by appellee against the Illinois Central Railroad Co. for false imprisonment. Plea not guilty. On the trial it was shown that the plaintiff, while in the waiting-room of the defendant at the passenger-depot in Jackson, was arrested, without warrant, by a police officer of the city, and was taken to the jail or lock-up, where, after being searched, he was

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confined all night, being taken the next morning before the police court, when he was promptly released, no one appearing to prosecute or even to prefer a charge against him. When the arrest was made, L. F. Montgomery, the depot-master of defendant at Jackson, was present, and he also went with the parties to the jail, and was present when plaintiff was searched. Some of the circumstances in evidence tended to show that he was instrumental in making the arrest, but he testified positively that he was not, and that the policeman made the arrest at the instance of one O'Brien, who was in the waiting-room, having bought a ticket for passage to New Orleans, and who claimed that the plaintiff was attempting to rob him. When the officer went in to make the arrest, he took hold of another person, when Montgomery pointed out plaintiff as the man O'Brien wished to have arrested, whereupon plaintiff was arrested. It was shown that Montgomery extended O'Brien's ticket, in order that he might remain over and prosecute plaintiff. But O'Brien, who was a stranger, and who it seems was drinking and irresponsible, failed to prosecute. The next morning Montgomery appeared at the police court with the attorney of the railroad, who stated that the company had no charge to make. Montgomery testified that he went to the jail merely from curiosity; that he had no business at the police court, and stopped there, as he had been in the habit of doing at times, when he went up town the next morning. There was no positive or direct evidence that he caused the arrest to be made.

Defendant asked the court to instruct the jury to find a verdict in its behalf. This was refused, and the jury found for plaintiff in the sum of $250, and judgment was entered accordingly, from which this appeal was prosecuted. No motion for a new trial was made, but the defendant excepted to the action of the court in refusing to grant the peremptory instruction, and all the testimony was embodied in a bill of exceptions. The only error assigned is the refusal of the

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Brief for appellee.

court below to give the peremptory instruction to find for defendant.

Mayes & Harris, for appellant.

1. In the law of contracts an agent binds his principal when acting within the *apparent* scope of his authority, but the rule is different in *tort*. In such cases the principle, *respondeat superior*, can never apply unless the servant in the specific instance was acting *under* the master's employment, although in a manner not authorized. *McManus* v. *Crickett*, 1 East, 106, cited in Story on Agency, 474; *Joel* v. *Morrison*, 6 Car. & P., 631; *Lamb* v. *Polk*, 9 *Ib.*, 631; *Mitchell* v. *Crossweller*, 76 Eng. Com. L. R., 237; *Storey* v. *Ashton*, L. R., 4 Q. B., 476; *Patton* v. *Rea*, 89 Eng. Com. L. R., 606; 19 Ohio, 110; 26 Pa., 482; 5 Gilman, 425; *McCoy* v. *McKowan*, 26 Mass., 487; *R. R. Co.* v. *Harrison*, 48 *Ib.*, 112.

Here there is no question of a passenger relation between plaintiff and the railroad company. Hence, the distinction made in the case of *Railroad Co.* v. *Albritton*, 38 Miss., 242, does not militate against our position.

The declaration alleges that what Montgomery did he did *qua* agent, but the proof wholly fails to show this. It was wholly inadequate to take the case to the jury.

2. The evidence fails to show any connection of Montgomery with the arrest which would impose on him even a personal liability, and hence there can be no liability on the company.

3. In informing the officer that he was about to arrest the wrong person, and in pointing out plaintiff as the man O'Brien wished to have arrested, Montgomery did right. Both as agent and as a citizen it was his duty to correct a mistake of that kind. *Gosden* v. *Elphinck*, 4 Exch., 445.

Brame & Alexander, for appellee,

Filed a lengthy brief discussing the facts, and contending that the verdict was supported; that, in any view of the

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case, there was evidence tending to show liability on the part of the defendant, and therefore it was proper to refuse the peremptory instruction.

Argued orally by *J. B. Harris*, for appellant, and *C. H. Alexander*, for appellee.

CAMPBELL, C. J., delivered the opinion of the court.

The question in this appeal is not, as stated by counsel for the appellee, "whether there is any evidence showing, or *tending to show*," liability of the defendant; but the question is, whether the evidence is sufficient to warrant a verdict for the plaintiff in any view of it which might be legally taken; and, trying it by this test, we think the peremptory instruction asked by the defendant was rightly refused.

Affirmed.

ALABAMA & VICKSBURG RAILWAY CO. v. J. M. PHILLIPS.

1. INSTRUCTION. *Weight of evidence. Assuming facts.*

An instruction is not objectionable, as being on the weight of evidence, because it assumes as true matters proven by both parties, or about which there is no controversy.

2. RAILROADS. *Speed in towns. Code* 1880, § 1047. *Negligence.*

Although by § 1047, code 1880, running a train within an incorporated town at a *greater* rate of speed than six miles an hour is *per se* negligence, it does not follow that running at a *less* rate of speed is always lawful. Whether it is negligence or not must be determined by the circumstances of each case.

3. SAME. *Accident at crossing. Reasonable precautions. Instruction.*

In an action to recover of a railroad company for injuries received in jumping from a vehicle to avoid collision with a moving train at a crossing, it is error to instruct for plaintiff that, in determining whether the engineer did all he should have done to avoid the collision after he

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Brief for appellant.

saw the vehicle and its danger, the jury might consider certain stated facts which throw no light on that inquiry, but merely tend to show negligence *before* seeing the vehicle.

FROM the circuit court of Warren county.

HON. J. D. GILLAND, Judge.

Action for personal injuries. Judgment for plaintiff for $300. Defendant appeals. The opinion sufficiently states the case.

Shelton & Brunini, for appellant.

Appellant's duty to stop its train did not arise until the engineer saw that the vehicle would not stop. He had a right to suppose that drivers of all vehicles would be on the lookout for trains. *Railroad Co.* v. *Mitchell*, 52 Miss., 808. The right of the traveler upon the highway and at crossings of the company are, in a sense, equal, but that of the latter is superior in respect to priority of passage. *Railway Co.* v. *Walker*, 3 Am. St. R., 638. There is no duty to stop because persons are seen approaching the track. It is presumed they will take needed precautions. 10 Am. St. R., 614; 11 *Ib.*, 778. The only duty on defendant was not to move its trains over six miles an hour, give proper alarms, and for the engineer to be on the lookout. The fourth instruction imposes a different and greater degree of care, but still leaves it uncertain what the duty of the defendant was. From it the jury might well infer that, because the view of the crossing was obstructed, the train should have been brought to a standstill. The proper standard, as to negligence, in such case is given in *Railroad Co.* v. *Scurr*, 59 Miss., 456. It was necessary to show gross negligence or reckless disregard of consequences.

Nugent & Mc Willie, on the same side.

The fourth instruction assumes that there was evidence tending to show that it reasonably appeared to the engineer, at some time, that the herdic could not be stopped before

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reaching the track, and that the only issue was the exercise of ordinary care after such discovery. The reverse is shown by the uncontradicted evidence. The recitation of certain facts in the instruction gave undue prominence to them, and this is on the weight of evidence. *Hemingway* v. *State*, 68 Miss., 371; *Cheatham* v. *State*, 67 *Ib.*, 335; *Meyer* v. *Blakemore*, 54 *Ib.*, 570; *Dean* v. *Tucker*, 58 *Ib.*, 487.

Dabney & McCabe, for appellee.

There was no error in the instructions. They were even more liberal than defendant was entitled to under the law. If error there was, it was in instructing that the company had greater rights at the crossing than the herdic had. Their rights were at least equal. There was evidence that the engine was backing at a rate of twelve miles an hour. The crossing was a public one, and the view obstructed. We submit there was gross negligence, and defendant should congratulate itself on the meagerness of the verdict.

Argued orally by *W. L. Nugent*, for appellant.

COOPER, J., delivered the opinion of the court.

The danger of multiplying instructions in the trial of causes finds another illustration in this case.

The plaintiff sued to recover damages for an injury caused, as he contends, by reason of the negligence of the servant of appellant in the management of an engine in the city of Vicksburg, by reason of which there was apparent danger of collision between the engine and a herdic, in which plaintiff was a passenger, to escape which danger he jumped from the herdic, and in so doing received the injury for which he seeks recovery.

The negligence of defendant's servant was sought to be established (1) by evidence tending to show that the engine was rapidly driven along defendant's road, where the same was crossed by Cherry street, and that no reasonable look-

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out was kept to see whether there was danger to persons passing along said street and across said road; (2) by evidence tending to show that after the danger was discovered by defendant's servant, he failed to exercise care to avoid the threatened injury.

Many instructions were asked, and among those given for the plaintiff was the following, marked 4 in the record:

"Negligence is a want of ordinary care. What would be negligence in one case might not be in another. The rule is, the greater the risk or danger, the greater must be the care; and in determining whether the defendant company used ordinary care in stopping its engine after it reasonably appeared to the person in charge that the herdic would not stop before reaching the track, the jury are to look at all the facts disclosed by the evidence—the fact that the collision occurred on one of the public streets of the city, where plaintiff had a right to be, and where persons and vehicles are constantly passing and repassing; the experience or inexperience of the person in charge of the engine; the speed at which it was going; the difficulty, if any, of seeing persons or vehicles approaching the crossing from either direction; the nearness he would have to approach to the crossing before he could see persons or vehicles on the same, and all other facts and circumstances established by the evidence, which would, in the opinion of the jury, shed any light upon the inquiry. And should the jury, after a careful consideration of all such facts and circumstances, be of opinion that the company did not use ordinary care in so stopping its engine, they will find the issue joined for the plaintiff, if they believe from the evidence he was injured thereby, even though the jury believe from the evidence that the injury was not caused by running at a greater rate of speed than six miles an hour."

Appellant objects to this instruction, upon these grounds:

1. Because it assumes as proved, the fact that at some time before the collision the engineer realized that the herdic would go across the track; that the collision was upon a

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public street; that the plaintiff had a right to go along said street over the railroad; and that persons and vehicles were constantly passing and repassing at the crossing.

2. Because it permitted the jury to find that the engineer was careless in approaching the crossing, though the rate of speed of the engine was less than six miles per hour.

3. Because the facts to which the attention of the jury was directed were not relevant to the inquiry suggested by the instruction.

Neither of the first two exceptions is well founded. True, the instruction assumed the facts therein recited to be proved, and this would have been erroneous if the facts so assumed had been controverted. But there was no conflict in the evidence touching these facts, or any of them. In fact, they were testified to by the witnesses for both plaintiff and defendant. While the court may not by an instruction express an opinion upon the weight of evidence, or assume a controverted fact to be proved, it is not erroneous to so instruct upon facts as to which there is no controversy, but which have been proved by both parties, or conceded to be true.

The second objection is untenable, for the reason that it rests upon the hypothesis that a railroad company owes no other duty to those passing along the streets of a city than to run its trains at a less rate of speed than six miles an hour, and to ring the bell or blow the whistle in crossing streets. This is a total misconception of the purpose and effect of the law prohibiting trains from being run within the limits of an incorporated town at a speed exceeding six miles an hour. The statute makes a greater rate of speed than six miles an hour unlawful, but it does not result that a less rate is at all times and places, and under all circumstances, lawful. That is to be determined by the circumstances of each occasion, and if, *but* for the statute, negligence would be imputed to the company, it is not *by* the statute absolved therefrom. Running a train within the limits of a town at a speed exceeding

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six miles an hour is *per se* negligence; running it at a less rate may or may not be, according to the circumstances.

The third exception is well taken. The instruction is erroneous. By it the jury was instructed that, in determining whether the engineer was guilty of negligence in not stopping his engine *after* he had discovered the danger of collision, it might, and should, consider certain facts tending to show negligence before he saw the herdic.

If the instruction had been that, if by reason of negligence existing before the engineer discovered the herdic the injury resulted, the company would not be absolved from liability, because, after the engineer saw the impending danger, he did what he could to avoid it, that would have been a correct announcement of the law. But it is not true that any thing less than negligence before seeing the herdic, added to any thing less that negligence after seeing it; or that negligence before seeing added to less than negligence after seeing the herdic, would warrant the jury in finding the particular negligence pointed out by the instruction, viz., the failure to use ordinary care in stopping its engine after it appeared to the person in charge that the herdic would not stop before reaching the track.

The evidence is conflicting, as well upon the question of a negligent approach to the crossing as upon that of the conduct of the engineer after he had discovered the danger of collision. It is difficult to suggest what the engineer might have done to avoid the collision, after he discovered the danger, other than to stop the engine. Indeed, plaintiff's instruction assumes that the negligence was in not sooner stopping it. Now, it is manifest that, in the nature of things, the facts detailed in the instruction could throw no light upon the conduct of the engineer after the danger was seen and appreciated. The fact that the collision was upon a public street, where the plaintiff had a right to be; that persons were passing and repassing; the difficulty of seeing persons approaching the crossing, were all pertinent to the inquiry

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"whether the engineer should have expected persons to be on the crossing," and may, under circumstances, fix negligence upon him for not anticipating that persons would be there, and for not acting in reference to such expectation; but neither one nor all of them could afford any evidence of what he did or did not do after he saw and realized the danger of an impending collision.

We cannot say that the jury was not influenced by this instruction to the injury of the appellant.

The judgment is reversed and cause remanded.

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T. W. WELSH v. ALABAMA & VICKSBURG RAILWAY CO.

1. RAILROADS. *Injury to employe. Unsafe appliance. Const.* 1890, § 193.

Section 193, constitution 1890, which provides that "knowledge by any employe injured of the defective or unsafe character or condition of any machinery, ways or appliance, shall be no defense to an action for injury caused thereby, except," etc., abolishes the defense of contributory negligence in such actions, unless the negligence of such employe be wilful or reckless.

2. SAME. *Wilful negligence of employe. Question of fact.*

Where, in such case, the employe testified that he had seen that the appliance causing the injury was defective, but had reported it and believed, or had reason to believe, it had been remedied, it was for the jury to say whether he was wilfully or recklessly negligent in his use of it.

3. CLAIM FOR DAMAGES. *Compromise. Fraudulent representations.*

Where a railroad company sued by an employe for damages for personal injuries, pleads a release executed by plaintiff, he may avoid the same by showing that it was signed under the belief, induced by the fraudulent representations of the defendant's agents, that it was merely a receipt for wages.

FROM the circuit court of Warren county.
HON. J. D. GILLAND, Judge.

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Statement of the case.

Appellant, Welsh, was a switchman in the employ of appellee, the Alabama & Vicksburg Railway Co., his duty being to ride upon the switch-engine, and open and close switches and couple cars. His usual station was on the "foot-board" of the engine. This appliance, which occupies on switch-engines the position occupied on ordinary engines by the pilot, is a level board or platform, a step above the ground, firmly attached to the front of the engine, and intended mainly for the use of the switchman. Welsh was injured by falling from the foot-board, while engaged in the performance of his duties, and brings this action to recover damages, claiming that his fall was caused by the insecure fastening of the foot-board, which caused it to give way when he stepped upon it.

In addition to the general issue, the defendant pleaded that it had fully satisfied plaintiff's demand, and, in support of the plea, introduced in evidence a release signed by plaintiff, reciting that, in consideration of $15 paid to him by the railway company, he released it from all liability to him because of such injury. Plaintiff, however, replied, denying that he ever executed such acquittance, or that he did so knowing its purport, and alleged that, if executed by him, his signature was obtained by the fraud of defendant's officers in leading him to believe he was signing a "time-check" for money due to him as wages. Plaintiff, as to this, testified that he lost fifteen days from his work, and that the sum paid was supposed by him to be his half-pay during that time; and that he did not sign any release, but merely wrote his name across a check presented to him by a superior officer of the company, and which was represented to him as being a "discharge check for fifteen days, at one dollar a day." He further testified that he did not read the paper signed by him, but took it immediately to the ticket-office and had it cashed. He denied that the signature to the release was genuine, and denied that he had ever seen that paper.

The officials of the company, on the other hand, testified

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Statement of the case.

that the release was signed by plaintiff, and that he was fully aware of its purport, and that no unfair means were used to obtain it.

On the trial the court gave the following instructions for the plaintiff:

1. "If the jury find for the plaintiff, the measure of damages is not only the pain and suffering, loss and injury, if any, already sustained, but also the disability, injury and suffering, if any, which will thereby be occasioned in the future."

2. "It was the duty of the defendant company to provide engines with suitable and safe appliances thereto, so that its workmen or switchmen, in the performance of their duty to the company, could safely get upon, or stand upon, the footboard while engaged about their work in the exercise of due caution, and if the jury believe from the evidence that the plaintiff, while at work for said company as a switchman, was injured through the neglect of the company to furnish such safe and suitable appliances to its engine which plaintiff could safely get upon or stand on while pursuing the ordinary course of his duty with due care, and without any fault of his, then the jury will find for the plaintiff, unless the jury believe that plaintiff has already compromised or settled with defendant for such injury."

3. "If the jury believe from the evidence that plaintiff was induced to sign a release of his claim for damages by representations of defendant's agents that he was merely signing a receipt for fifteen days' half-pay for the time he was sick, or if he signed it under such a belief induced by defendant's officers and agents, or if they believe that he did not sign it at all, then it would not operate as a bar to this action."

It is not necessary, in view of the opinion, to set out in full the defendant's instructions. Touching the matter of the release, they declared that, if signed by plaintiff, it would bind him, if there was no fraud used to induce its execution; that, unless he was fraudulently imposed upon, he

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Brief for appellee.

could not avoid the effect of the release, even though he did not read it, and supposed it was a receipt for wages.

There was a verdict and judgment for plaintiff for $500, but, on motion of defendant, this verdict and judgment were set aside, and a new trial awarded, to which action of the court the plaintiff excepted.

On the second trial the evidence was the same as on the former trial, the stenographic notes of the testimony having been read by consent, and the court gave a peremptory instruction for defendant, refusing all the instructions asked by the plaintiff. There was judgment accordingly. Motion for new trial overruled. Plaintiff appeals.

The opinion contains a further statement of the case.

Gibson, Henry & Bien, for appellant.

To the contention that, the injuries having resulted from the negligence of a fellow-servant the defendant is not liable, we cite constitution 1890, § 193. The engineer, in the discharge of his duty to keep the engine in repair, is not a fellow-servant of the switchman. But, if he were, it is still the duty of the company to furnish safe appliances. See 4 Metc., 49; 7 Pac. Rep., 795; 67 N. Y., 593; 49 *Ib.*, 521; 26 Neb., 271; 24 Fed. Rep., 124; 55 Tex., 110; 110 Mass., 241. The duty to keep the machinery in safe condition is equally imperative. 62 Tex., 267.

Shelton & Brunini, for appellee.

The engineer and switchman were engaged in the same department of labor. Constitution 1890, § 193, therefore, has no application. But if it be true that those whose duty it is to furnish safe appliances are vice-principals, yet that doctrine cannot apply here.

It is the negligence that causes the injury that must be looked to. Hence, if there was negligence in the mechanical department, it was entirely neutralized by the plaintiff's discovery of the condition of the machinery. He admits that

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he had seen the unsafe condition of the foot-board, and relied merely on the promise of the engineer to fix it. The failure of the engineer to do so, was a failure connected with the operative, not mechanical, department of the railroad, and his negligence was the negligence of a fellow-servant. 2 Thompson on Neg., 1089.

Nugent & McWillie, on the same side.

The loosening of the foot-board was the result of the movement of the engine, and could be remedied by the engineer in a moment. There was no defective appliance. The duty to keep the foot-board firm was part of the engineer's duty in operating the train. Section 193, constitution 1890, therefore has no application.

The plaintiff negligently stepped on a slanting foot-board, which he knew to be unsafe. He cannot recover. 2 Am. & Eng. R. R. Cas., 162; 28 *Ib.*, 308, 497.

We submit that the evidence to show that the release was fraudulently obtained wholly failed.

Argued orally by *W. L. Nugent*, for appellee.

WOODS, J., delivered the opinion of the court.

In considering the action of the court below on the second trial, in giving the peremptory instruction for the appellee, we exclude all reference to the controverted fact of a settlement by the railway company for the injuries complained of, and a release by the appellant. That question was not involved in the action of the court.

The peremptory instruction rests upon the assumption that the appellant's case, as made by all the evidence, including his own, failed to make any issue of fact upon which a jury could be properly called to pass. Undoubtedly the learned court held that the injury complained of was the result of appellant's contributory negligence in using the defective appliance, the unsafe foot-board, after notice of its condition on his part.

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Formerly this view would have correctly governed. But section 193 of the present constitution practically destroys this defense in cases where no wilful or reckless negligence can be predicated of the conduct of the injured and complaining employe. "Knowledge by any employe injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." The change is radical, sweeping, unambiguous, and we must enforce it as written.

The appellant was a switchman. According to his evidence, he had seen that the foot-board was unsafe, but he believed, or had reason to believe, that, when he used it, the defect had been remedied. He was not wilful or reckless in his use of it, judged by his own evidence, and the issue of fact should have been submitted to a jury. The judgment must therefore be reversed.

This brings next to our consideration the exception of the appellant to the court's action in setting aside the first verdict rendered for appellant, and in awarding a second trial.

The instructions given for the appellant are singularly clear and brief, and they are unobjectionable, at any rate from appellee's stand-point.

In view of what has already been said by us touching the court's action in granting the peremptory instruction for appellee, it is clear to us that no harm was done the railway company by the court in failing to give all the instructions asked. The case was fairly submitted to the jury, and the issues of fact found against the appellee, and that finding is not unsupported by evidence. It follows that the action of the court in setting aside the first judgment, was erroneous, and the same must be re-established here.

Reversed, and judgment in this court.

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Statement of the case.

WESTERN UNION TELEGRAPH CO. v. W. K. McLAURIN.

1. TELEGRAPH COMPANIES. *Sunday message. Failure to transmit. Code* 1880, § 2949.

A telegraph company accepting for transmission on Sunday, and receiving pay for sending, a message which requests the presence of a lawyer whose services are urgently required in a criminal case, is liable in damages for a failure seasonably to transmit and deliver it. That the transaction is violative of the Sunday law, § 2949, code 1880, is no defense.

2. SAME. *Recovery by sendee. Damages.*

In such a case the *sendee* may sue, and is entitled to recover the statutory penalty, and also, as damages, the fee he would have earned had the message been seasonably delivered, the nature and urgency of the message appearing on its face.

FROM the circuit court of Warren county.

HON. JOHN D. GILLAND, Judge.

One Metcalf killed Dwyer, in the town of Cleveland, Miss., on Sunday, July 19, 1891. His preliminary trial before a magistrate was fixed for ten o'clock the next morning. One Julias A. Robinson, a lawyer living at Cleveland, at four o'clock Sunday afternoon, delivered to the operator of appellant at that place a message, addressed to appellee, W. K. McLaurin, a lawyer, at Vicksburg, Miss., in the following words: "Metcalf killed Dwyer. Come on first train. Good fee for defense."

The sending of the message was authorized by Metcalf, who desired the services of McLaurin in his defense at the preliminary trial the next morning. McLaurin was in Vicksburg, and if the message had been promptly delivered he could have gone to Cleveland on the night train; but it was not delivered until the next morning, and then it was too late to get a train to reach Cleveland in time for the hearing. He went, however, by a freight-train, but reached Cleveland too late for the trial. He testified that Metcalf was offended

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Statement of the case.

because of his failure to arrive in time, and refused to employ him. He had waived examination, and was admitted to bail before McLaurin arrived. Robinson testified that he refused, because of his want of experience, to represent Metcalf at the hearing. The telegraph company kept open an office on Sunday at Cleveland and at Vicksburg, and was paid for the transmission of the message in question. It does not appear that the operator was informed that the trial would take place the next morning, or knew that Metcalf had authorized Robinson to send the message, or that Metcalf would be unrepresented if McLaurin should not reach Cleveland in time. McLaurin sued the company for $25, the statutory penalty for failure to deliver the message, and also for $150, damages for the loss of the fee on account of such failure. The defendant prevailed in the justice court, and McLaurin appealed to the circuit court. On the trial in that court, the above facts substantially were shown, and the following instructions were given on behalf of the plaintiff:

"If the jury believe from the evidence that the delivery of said telegram was a work of necessity, then it was the duty of the defendant company to use reasonable diligence to deliver the telegram read in evidence, to the plaintiff; and if it failed in this, the plaintiff is entitled to a verdict for such damages as the jury believes, from the evidence, he has sustained, in addition to the penalty provided by law, which is $25.

"If the jury believe, from the evidence, that the transmission and delivery of said telegram was a work of necessity, and that the defendant company received the telegram read in evidence, at its office in Cleveland, Miss., at or about the hour of four o'clock P.M., on the nineteenth day of July, 1891, and neglected to transmit and deliver the same, within a reasonable time, to the plaintiff, W. K. McLaurin, at Vicksburg, without good and sufficient excuse, then the plaintiff is entitled to a verdict for the statutory penalty of $25, without regard to the amount of the damage sustained; and any

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Brief for appellant.

and all additional damages which the jury may believe, from the evidence, the plaintiff has sustained.

"The defendant is charged, in law, with notice of all the telegram shows upon its face, and of its importance, if such fact appears therefrom, and the necessity, if any, for immediate delivery, if such necessity appears therefrom.

"If the defendant was negligent in the delivery of the telegram, and if such delivery was a work of necessity, the plaintiff is entitled to a verdict. Negligence is the want of ordinary care. What would be ordinary care in one case might not be in another; and in determining whether defendant used due care or not from the reception of the telegram until its delivery, the jury may take into consideration the character of the telegram, the distance from Cleveland to Vicksburg, the location of plaintiff's office and bed-room, and all other facts established by the evidence which will shed any light on this subject."

A motion to rule out all the testimony and instruct the jury to find for defendant, having been overruled, the following instruction was given at the instance of defendant:

"The court instructs the jury for defendant, that, as the telegram to plaintiff was sent on Sunday, he cannot recover from defendant, unless they believe, from the evidence, that it was a work of necessity, and, unless they believe, from all the evidence in the case, that it was apparently necessary for Metcalf to have the services of McLaurin on Monday, then they will find a verdict for the defendant."

Verdict and judgment in favor of plaintiff for the sum of $125, damages, and $25, statutory penalty. Motion for new trial overruled. Defendant appeals.

Mayes & Harris, for appellant.

1. It does not appear that any of the circumstances attending the transaction were made known to the company. It was not informed as to the time of the trial, or that Metcalf

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had authorized the sending of the message, or that he would be unrepresented if McLaurin failed to go.

2. The transaction occurred on Sunday, and neither Metcalf nor McLaurin have any legal remedy. The case does not come within the exception to the Sunday statute, § 2949, code 1880. Railroads and steam-boats are expressly excepted, but telegraph companies are not. Therefore, all business done by them on Sunday is in violation of law, unless it comes within the language of the statute—"other work of necessity or charity."

Contracts made on Sunday are void. 5 Lawson's Rights, Rem. & Prac., p. 4025, § 2411. Such is the law of this state. 7 How., 14; 7 Smed. & M., 389; 24 Miss., 9; 26 *Ib.*, 627; 41 *Ib.*, 142, 240; *Black* v. *McMurray*, 56 *Ib.*, 217. It has been held in Missouri and Indiana that a telegraph company is liable for the failure to transmit telegrams on Sunday, where the same is a work of necessity or charity. The statutes of those states, unlike ours, make no exception in favor of railroads and steam-boats. As we have such exception which does not include telegraph companies, it might well be insisted that all telegraphing in this state on Sunday is illegal. However that may be, sending the message in this instance was not a work of necessity. In the reported cases the necessity always has been that of the sender of the message, the party with whom the contract is made. Here it is not insisted that there was any necessity so far as McLaurin was concerned. If it be true that this was a work of necessity as to Metcalf, and he was injured by the delay, he could sue. But, because it was a work of necessity as to him, does not make it so as to McLaurin. The telegram from one lawyer, informing another that he could make a fee by going to a certain place is not work of necessity.

3. The courts have not undertaken to say, as a matter of law, what are works of necessity. Each case depends on its own facts. But when the facts are undisputed, as here, it is a question for the court and not for the jury. On this point

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see Gray's Tel. Com., p. 25, note; Thompson on Electricity, § 166, *et seq.*; 78 Ind., 169; 118 *Ib.*, 248; 32 Mo. App., 191; 39 *Ib.*, 599.

4. *Allen* v. *Telegraph Co.*, 66 Miss., 549, holding that the sendee may recover, is not applicable, for there the Sunday law was not involved. Here there was no actual necessity as to Metcalf, and if he had really needed the services of McLaurin, the telegraph company was not apprised of the fact; nor did it know that the trial was to be hurried. It had no notice of any thing except sending the message. On this point see 118 Ind., 248.

5. Even if the penalty is recoverable, there was no right to recover any thing on account of a supposed fee. The evidence is wholly insufficient as to this.

Dabney & McCabe, for appellee.

It is not necessary to maintain that the defendant, by keeping open office on Sunday, receiving telegrams and pay for sending them, is liable in damages for failing to perform the duty. The case falls clearly within the exception to § 2949, code 1880, and it is for the jury to determine the question of necessity.

But, if it be a question of law for the court, plaintiff's right to recovery is clear. The exception in the statute does not include merely absolute necessity, or moral fitness or propriety of the work. 59 Ind., 416; 79 *Ib.*, 393; 118 *Ib.*, 248; 56 Md., 209; 39 Mo. App., 599; *Hennersdorf* v. *State* (Texas), 8 S. W. Rep., 926; *Telegraph Co.* v. *Griffin* (Ala.), 9 So. Rep., 414.

Argued orally by *J. B. Harris*, for appellant.

CAMPBELL, C. J., delivered the opinion of the court.

If the view of the Sunday law held by the courts of Indiana and Missouri, and cited by counsel, is to prevail in this state, this case would seem to have been given to the jury

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with proper directions; and although the jury did not regard *necessity* with reference to work lawful on the Sabbath day, commonly called Sunday, in the sense with which that term was employed in framing the "Shorter Catechism," wherein it tells *how the Sabbath is to be sanctified*, neither did the courts mentioned, but they recognized an enlarged meaning of necessity so as to embrace *social* necessity, and admitted, as an exception, messages under circumstances which, in our opinion, did not create as great a necessity as disclosed by this case.

It is argued that the *necessity* must be that of the sender, and not the sendee. Our understanding of the cases cited is that the *necessity* or *charity* of the act takes it out of the prohibition of the law, and then all the legal consequences of the act on any secular day will follow as to the rights and liabilities of the parties. We do not commit ourselves to the view held by the cases cited, nor do we express any dissent from them.

It may be that the true view is that if a telegraph company should, in a spirit of piety or regard for the law, refuse to receive a message for transmission on Sunday, and was sued for that, and invoked the law of God and the state as a defense, it would find this ample protection against a claim for damages; but that the piety which admits of open offices and receipt of messages and pay for their dispatch on Sunday, should be equal to the duty of transmission and delivery, as on other days; and that the sendee, whose right of action rests not on contract, but on breach of duty, may recover, without regard to the day. We do not commit ourselves to this view now, as the case does not call for it. In either view of the law, the appellant has no just cause to complain of the action of the court below, and the judgment will be *Affirmed.*

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Syllabus.

GEORGE NAIL v. THE STATE.

1. CONSTITUTIONAL LAW. *Qualification of jurors. Const.* 1890, §§ 241, 264, 274, 276. *Code* 1880, § 1661.

Section 264, constitution 1890, declaring that no person shall be a grand or petit juror unless a qualified elector, and § 241, which provides that no one shall be a qualified elector unless registered, were suspended in their operation—the former by § 274 until April 1, 1892, because of repugnancy to § 1661, code 1880, and the latter by § 276 of the constitution until January 1, 1891; but, since registration under the constitution was left to be provided for by the legislature, which was not to meet until January, 1892, these sections, so far as they required registration as a qualification for voters or jurors, were impliedly and of necessity further suspended until the registration to be provided for by the legislature could be had.

2. SAME. *Juror not registered. When not ground for challenge.*

Accordingly, after April 1, 1892, but before the registration of voters provided for by the legislature in 1892, it was not a good ground for challenging a juror, otherwise qualified as a voter, that he had not registered under the constitution of 1890.

3. QUALIFICATION OF JURORS INELIGIBLE AS VOTERS. *Non-payment of poll-tax.*

But, if it was further objected that such juror had not paid his poll-tax as required by § 241, constitution 1890, and was, therefore, ineligible to registration, the challenge should have been allowed, for, as to this qualification, said section was not impliedly or of necessity suspended to await legislation, and the juror could not have registered, if opportunity had been offered.

4. CHALLENGING INCOMPETENT JUROR. *Reversible error. Const.* 1890, § 264.

Where defendant's peremptory challenges have been exhausted, refusal by the court to set aside an incompetent juror upon the challenge of the accused is reversible error. Constitution 1890, § 264, declaring that "the want of any such [constitutional] qualification in any juror shall not vitiate any indictment or verdict," does not apply where the judgment is assailed because of the court's action in overruling an exception seasonably made to a juror.

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Brief for appellant.

5. CRIMINAL LAW. *Instruction. Uncertainty. Case.*

On a trial for wrecking a train, the court instructed the jury, for the state, "that in determining their verdict they are not circumscribed nor confined to the testimony of witnesses, but can consider all the circumstances surrounding the case; and it is not necessary to prove the actual facts of the conspiracy to wreck a train, but that it may be collected from collateral circumstances, if any, which may be in evidence." *Held*, if this instruction means that the jury is not confined to the testimony of witnesses, when there is no other evidence before it, it is erroneous; if it intended to declare that facts need not be established by positive testimony of witnesses, but may be proved by circumstances, it is objectionable for vagueness.

FROM the circuit court of Warren county.
HON. J. D. GILLAND, Judge.
The case is stated in the opinion.

Marshall & Vollor, for the appellant.

Section 264 of the constitution, was not meant to allow a jury to be made up of incompetent jurors over the challenges of the accused. Its true meaning is that, if a party accepts or fails to object to an incompetent juror, he cannot, after verdict, raise the objection. Such a construction is the natural one, in view of the old law, the mischief and the remedy. See *Painter* v. *Trotter*, 10 Smed. & M., 537; *Martin* v. *O'Brien*, 34 Miss., 21; *Shelton* v. *Baldwin*, 26 *Ib.*, 439; *Ingraham* v. *Speed*, 30 *Ib.*, 410; *Read* v. *Manning*, *Ib.*, 308; *Olive* v. *Walton*, 33 *Ib.*, 103. The accused promptly exercised his right to object to the incompetent jurors, and was compelled to proceed to trial with them on the panel.

It was necessary that the jurors be qualified electors—not qualified at the time of the preceding election, but at the time of the trial. Surely, if a special election were then taking place, men who had not paid their poll-tax for the preceding year could not vote.

It was error to give the fourth instruction for the state. If the jury is not circumscribed or confined to the testimony of witnesses, when the only evidence in the case is that given

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by witnesses, it could act on evidence not before it, and which could not be in the record on appeal.

T. M. Miller, attorney-general, for the state.

1. It may be admitted that the court erred in refusing to set aside the jurors, but, by the plain letter of the constitution, the absence of the qualifications prescribed for jurors by the constitution shall not vitiate the verdict. The court cannot depart from the plain language of that instrument. Section 264 was intended either as directory to the legislature and the courts, or to discredit in the community persons neglecting civil and political duties.

2. The objection to the fourth instruction is fanciful. If it stood alone, it could not mislead. It plainly meant to tell the jury it could consider facts and circumstances in determining whether a conspiracy existed. It could only mean the circumstances surrounding the case, as made by the witnesses.

COOPER, J., delivered the opinion of the court.

The appellant, together with Lige Bennett, *alias* Charles Wilson, and Louis L. Smith, was indicted for the crime of wrecking a train, and, a severance having been granted, the appellant was tried alone, and convicted, and now prosecutes his appeal.

The first error assigned is upon the action of the court in holding certain jurors to be qualified. A special bill of exceptions was reserved, from which it appears that, upon the examination of the jurors, upon their *voir dire*, "it was proven that M. J. Feeney, Jake Lowenberg and Tom Henderson had not paid their poll-tax for the year 1891, and that T. J. O'Dell, T. R. Brady and Tom Stafford had not paid their poll-tax for the year 1891 until after February 1, 1892, all those parties being legally and justly due the state the said poll-taxes, and not being exempt therefrom by any legal disability, and having had an opportunity to pay the same. The said jurors were duly qualified and registered electors under the

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registration of 1891, but were not registered under the registration of 1892, which is not yet completed according to law."

Upon these facts, the court held the jurors to be qualified, to which the defendant excepted.

Appellant contends that, at the date of the ruling excepted to—June 21, 1892—the jurors were disqualified, under section 264 of the constitution, which declares that "no person shall be a grand or petit juror unless a qualified elector, and able to read and write; but the want of any such qualification in any juror shall not vitiate any indictment or verdict. The legislature shall provide, by law, for procuring a list of persons so qualified, and the drawing therefrom of grand and petit jurors for each term of the circuit court."

The constitution became operative November 1, 1890, subject to the following limitations:

1. It was controlled until January 1, 1891, by all existing laws repugnant to the provisions of sections 240 to 253, inclusive.

2. It was controlled until October 1, 1891, by all existing laws repugnant to sections 254 to 256, inclusive.

3. It was controlled until April 1, 1892, by all other existing and repugnant laws, except those repugnant to—

(*a*) The ordinances of the convention;

(*b*) The provisions of section 183;

(*c*) The provisions of sections 223 to 226, inclusive.

Section 241 declares who are qualified electors. It is as follows:

"Every male inhabitant of this state, except idiots, insane persons and Indians not taxed, who is a citizen of the United States, twenty-one years old and upwards, who has resided in this state two years, and one year in the election district, or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, per-

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jury, forgery, embezzlement or bigamy, and who has paid, on or before the first day of February of the year in which he shall offer to vote, all taxes which may have been legally required of him, and which he has had an opportunity of paying according to law, for the two preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid said taxes, is declared to be a qualified elector; but any minister of the gospel in charge of an organized church, shall be entitled to vote after six months' residence in the election district, if otherwise qualified."

Looking to the code of 1880, we find that, by section 1661, it was declared that "all male citizens of the United States, and not being under the age of twenty-one years, nor over the age of sixty years, and not having been convicted of any infamous crime, shall be qualified to serve as jurors within the county of their residence."

This law was manifestly repugnant to section 264 of the constitution, and, by virtue of section 274, controlled the constitutional provision until April 1, 1892.

We infer, from the nature of the exception and its statement, and also from the brief of counsel, that the trial court held the juror to be competent because the first registration under the constitution had not been completed, and that, from necessity, the constitutional provision fixing the qualification of jurors was suspended until a new registration should be completed.

The principle of construction upon which the learned judge proceeded is a correct one, and necessary for the protection of society. It is particularly applicable to construction of constitutions, which declare general rules for the organization of government, and do not deal minutely with details. It certainly would not be held that there was no electoral body in the state, and no one qualified to hold office from January 1, 1891, at which time sections 240 to 253, inclusive, were declared by the schedule (section 274) putting the constitution in force, to be operative.

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Section 241 declares what qualifications are required for an elector, among which is that he shall be registered under its provisions. Section 249 declares that one not so registered shall not vote at any election. Section 250 declares that no one shall be eligible to office, except qualified electors. And yet there could be no registration under the constitution until after the legislature had provided therefor, and its first meeting was fixed by section 36 of the constitution, for January, 1892.

From necessity, the operation of those constitutional provisions which depended upon legislation, was suspended until after legislation was had. If, therefore, the qualification of the jurors had been challenged, on the ground that they had not registered under the constitution now in force, the ruling of the court below would have been correct, for the reason that by implication the constitution was suspended in its operation when a condition of things necessary and essential to its operation, and, therefore, clearly contemplated by the convention as a condition precedent, did not, and could not, exist.

But registration under the constitution is but one of many of the qualifications of an elector or juror. When one has been registered, his registration is evidence of the existence of other qualifications required by the constitution. But one not registered, and not possessing the qualifications which entitle him to be registered, may be incompetent, as well from the lack of those qualifications as from the want of registration.

The constitution has provided a standard by which the qualifications of electors and jurors shall be tried. One of these essentials is that he shall be registered. But, since no opportunity had been afforded for registration, and since the constitution implied that such opportunity should be afforded before the test of registration should be applied, an objection that the jurors challenged had not been registered, could not have been sustained.

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But the objection went beyond this, and was to the want of another equally essential qualification. As to this, there was no suspension of the constitution, because no necessity existed therefor. Suspension of constitutional provisions by implication, because of necessity, should be limited by the extent of the necessity. The jurors challenged by appellant could not have registered, because they had failed to pay their taxes, as required by the constitution, and his challenges should have been sustained.

But, it is said by the attorney-general, that if the challenges should have been allowed, it is not assignable error that they were not, because the constitution, while fixing the qualification of jurors, declares that "the want of any such qualification in any juror shall not vitiate any indictment or verdict." This position is not maintainable. The judgment in this case is not assailed because of the want of the qualification of the jurors, but because of the action of the court in overruling an exception, seasonably interposed, to the jurors. If the defendant, after indictment or conviction, had raised an objection to the grand jury by which he had been indicted, or to the jury by which he had been convicted, the provision relied on would have applied. *Williams* v. *The State*, 37 Miss., 407.

At the instance of the state, the court instructed the jury, among other things, as follows:

"The court instructs the jury that in determining their verdict they are not circumscribed nor confined to the testimony of witnesses, but that they can consider all the circumstances surrounding the case; and that it is not necessary to prove the actual facts of the conspiracy to wreck a train, but that it may be collected from collateral circumstances, if any, which may be in evidence."

We have been greatly perplexed by this instruction, and find it difficult to discover its meaning or purpose. Surely, the facts upon which the state relies for conviction must be proved, and when there is no evidence before the

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Statement of the case.

jury except the testimony of witnesses, the jury is confined thereto.

It may be that, by the instruction, it was intended to inform the jury that facts need not be established by the positive testimony of witnesses, but might be proved by circumstances, if in evidence, sufficient to satisfy the jury. If this was what was intended, it was but darkly expressed.

The judgment is reversed and cause remanded.

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I. R. HEGGIE *v.* I. B. STONE.

1. CONSTITUTIONAL LAW. *Mayor as ex officio justice of the peace. Jurisdiction.*

Under constitution 1869, providing for the election in each county, by districts, of a competent number of justices of the peace, it was not in the power of the legislature to give the mayor of a town the jurisdiction of a justice as to that part of the justice's district outside the town.

2. JURISDICTION. *Waiver. Appeal to circuit court. Code* 1880, § 2354.

When, by a town charter, the jurisdiction of a justice for the entire district is attempted to be vested in the mayor, one residing outside the corporate limits, though within the district, who is sued before such officer, does not, by appearing and defending on the merits, waive the right to urge in the circuit court, on appeal, the want of jurisdiction, since § 2354, code 1880, provides for a trial *de novo* on appeal, and requires the circuit court to dismiss causes where the justice had no jurisdiction.

FROM the circuit court of the second district of Carroll county.

HON. C. H. CAMPBELL, Judge.

The town of Vaiden is situated in district five, Carroll county. By the charter of the town, the mayor was made *ex officio* justice of the peace for the district, and Heggie sued Stone before him on a cause of action which arose outside the corporate limits. The defendant resided outside the town, but within the justice court district. The parties

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Brief for appellee.

appeared, and, without any objection being raised as to jurisdiction, the case was tried on its merits, resulting in a judgment for defendant, from which plaintiff appealed to the circuit court. In that court the defendant moved to dismiss the case, on the ground that the mayor, as *ex officio* justice of the peace, had no territorial jurisdiction. The above facts were shown, and the motion was sustained. From a judgment of dismissal the plaintiff appealed.

Somerville & McClurg, for appellant.

1. In dismissing this case, the circuit court acted upon the authority of *Bell* v. *McKinney*, 63 Miss., 187. We note the following as to that case: (1) That a mayor's court is an "inferior court," within the meaning of the constitution. (2) That neither the charter construed, nor the act of 1886, conferred on the mayor criminal jurisdiction outside the corporate limits. This was not attempted. (3) The corporate limits embraced a part of two counties, and the court says the act of 1886 did not give the mayor jurisdiction "co-extensive with the limits of two counties."

To give the mayor, as *ex officio* justice, jurisdiction within the limits of the district, is not violative of the principles announced in *Montross* v. *State*, 61 Miss., 429. He could be appointed or selected in any legitimate manner.

(2) The defendant waived the question of jurisdiction by going to trial on the merits, and not pleading in abatement. That the trial in the circuit court on appeal is *de novo*, does not change this. Where a court has jurisdiction of the subject-matter, appearance and pleading to the merits will give jurisdiction of the person. 57 Miss., 634; 59 *Ib.*, 189.

Sweatman, Trotter & Knox, on the same side.

Brewer & Wilson, for appellee.

1. The mayor of Vaiden is elected by the citizens of the town alone, and not by the voters of the entire district. The

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legislature could not, under the constitution, confer upon him the jurisdiction of a justice of the peace as to the territory outside the corporate limits. *Bell* v. *McKinney*, 63 Miss., 187. Therefore the court had no jurisdiction.

2. The appellee cannot be held to have waived any thing. He could make any available defense in the circuit court, for there the case was to be tried *de novo*. Where the court has no jurisdiction there can be no waiver. On this point, see *Rice* v. *Locke*, 59 Miss., 189.

I. T. Blount and *R. N. Miller*, on the same side.

CAMPBELL, C. J., delivered the opinion of the court.

Under the constitution of 1869, which provided that "a competent number of justices of the peace and constables shall be chosen in each county by the qualified electors thereof, by districts," it was not in the power of the legislature to clothe the mayor of a town, comprising a part of a district for the election of justices of the peace, with the official character and jurisdiction of a justice of the peace for the district outside of the town; and the charter of Vaiden, which contains a provision making the mayor *ex officio* a justice of the peace beyond the territory of the town, was, as to that, inoperative and void. Therefore, this case was not within the territorial jurisdiction of this justice of the peace.

The appearance of the defendant before the justice of the peace in Vaiden was not a waiver of his right to raise the question of the jurisdiction of the justice of the peace in the circuit court. Code of 1880, § 2354, expressly secures this right.

Affirmed.

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Statement of the case.

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W. H. ATKINSON v. J. M. GREAVES ET AL.

1. PURCHASER FOR VALUE. *Extending debt. Taking mortgage.*

The abandonment by a creditor of a present right to sue, and the acceptance of a mortgage to secure his debt, payable in the future, constitute him a purchaser for value. *Schumpert* v. *Dillard*, 55 Miss., 348.

2. BONA FIDE PURCHASER. *Payment of consideration. Burden of proof.*

Though the defense of a *bona fide* purchaser is affirmative, and must be pleaded and proved by one who relies upon it, proof of payment of the consideration is *prima facie* evidence of the want of notice, and devolves upon the opposite party the burden of showing notice.

3. SAME. *Purchase under trust-deed. Notice.*

When, to secure a creditor, a surviving husband has given a trust-deed conveying the fee of lands, as to which there is a secret resulting trust in favor of his children, the secured creditor being a *bona fide* incumbrancer, and afterwards the husband goes into bankruptcy, and the land is sold by the trustee and assignee in bankruptcy, acting conjointly under a decree of the bankrupt court, a good title passes, though it is recited in the schedules that the bankrupt had only a life-estate. The purchaser acquires title through the trust-deed, regardless of the recitals in the schedules.

FROM the chancery court of Madison county.

HON. H. C. CONN, Chancellor.

The appellees exhibited the bill in this case against the appellant, Atkinson, seeking to establish a trust in certain lands. They claim through their deceased mother. The lands were purchased prior to 1859 by S. A. D. Greaves, the father of complainants, who took the title in his own name. Complainants averred that the purchase-money paid was that of their mother, whereby a trust resulted in her favor. The defendant answered, denying the material allegations of the bill. Among other things, he set up the defense of a *bona fide* purchaser. He held under the sale mentioned in the opinion. The cause was heard on pleadings and proofs, and there was a decree in favor of two of the com-

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Brief for appellees.

plainants, the bill being dismissed as to the other. Defendant appeals. The other facts necessary to an understanding of the points decided are stated in the opinion.

W. H. Powell, for appellant.

When Greaves executed the trust-deed in favor of Estlin & Co., they granted to him, in consideration thereof, an extension of time for the payment of their large debt. They thus became *bona fide* incumbrancers. This being so, the purchaser under their trust-deed will be protected, regardless of any notice imparted by the record in the bankrupt proceedings. 46 Miss., 489; 54 *Ib.*, 159.

Nugent & McWillie, on the same side.

The defense of a *bona fide* purchaser was fully made out, and should have prevailed in the court below.

F. B. Pratt, for appellees.

1. Atkinson is not a purchaser without notice. He derived title through a sale under a decree of the bankrupt court, the records of which recited that Greaves had only a life-estate.

Again, the purchaser of land at a bankrupt sale takes it subject to all equities. *Steadman* v. *Taylor*, 17 Nat. Bk. Reg., 284.

2. The land was acquired by Greaves prior to the code of 1857, and the resulting trust in favor of his wife could only be defeated by purchasers without notice.

But, whether the law of 1857 controls or not, Estlin & Co. were not purchasers for value. They did not give credit on the faith of Greaves' legal title. They participated in the bankrupt proceedings, which recited that he only had a life-estate, and this shows that they had notice. Only the actual interest of Greaves was sold under the decree. The bankrupt court could not affect the rights of the remainder-man. *Kelly* v. *Mills*, 41 Miss., 273; U. S. Rev. Statutes,

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Brief for appellees.

§ 5053. All that the bankrupt court court could do was to sell the land, discharged of the lien in favor of Estlin & Co. U. S. Rev. Statutes, § 5075. And this is what was done. If Estlin & Co. had a lien against the estate in remainder, and never enforced it, the defendant acquired no rights under that. As the life-estate only was sold, he will not be heard to say there was no remainder, or that the burden of proof should be on the complainants. The burden of proof is on him to show that the remainder, subject to which the sale was made, did not exist.

H. B. Greaves, on the same side.

1. The proceedings in bankruptcy, under which appellant claims, contained full notice of appellee's equitable title, therefore, the defense of a *bona fide* purchaser is not good. Appellant and his vendors are conclusively presumed to have had notice of the facts and recitals of this record. 16 Am. & Eng. Enc. L., 798; 12 Kans., 186; 86 Tenn., 383; 1 Am. St. R., 826, and note, p. 829; *Ib.*, 296, 299; 7 *Ib.*, 129; 24 Miss., 208; 66 *Ib.*, 21.

If wrong in this, we submit that complainants were entitled to recover, because the appellant has no title. He claims through the sale made by the bankrupt court.

If we concede that S. A. D. Greaves owned the land absolutely, yet, inasmuch as he only surrendered in bankruptcy a life-estate, this is all the defendant acquired. Under United States Revised Statutes (§§ 5014, 5015), the bankrupt was required to file schedules, showing the particulars concerning the title of property surrendered. This was the method by which the court was vested with the authority to deal with the land in question, and formed the basis of all the proceedings through which appellant claims.

The decree should be affirmed.

Argued orally by *W. L. Nugent*, for appellant, and *F. B. Pratt*, for appellees.

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Opinion of the court.

COOPER, J., delivered the opinion of the court.

It is unnecessary to consider whether the evidence of complainants is sufficient to establish a resulting trust in their favor in the lands in controversy by reason of the payment of the purchase-money by their deceased mother.

Conceding that their father, S. A. D. Greaves, to whom the land was conveyed, paid for it with the money of his wife, and that a trust resulted to her, and that by her death the complainants succeeded to her right, and might have established the trust against S. A. D. Greaves, or against any one claiming under him, other than a purchaser in good faith, the complainants must fail in their suit, because the defendant's title is derived through a purchaser for value, and without notice.

The lands were conveyed to S. A. D. Greaves in the years 1855 and 1858. He was in possession in the year 1868, and, being then indebted to Estlin & Co. in a sum exceeding thirty thousand dollars, secured an extension of time for the payment of the debt by executing a deed of trust upon the land to Frank Smith, as trustee, with power of sale for the payment of the debt if it should not be paid at maturity. The abandonment by Estlin & Co. of a present right of action, and the acceptance of an obligation in lieu thereof, payable *in futuro*, constituted them purchasers for value, and it is not pretended that they had any notice of the secret equity of complainants. *Schumpert* v. *Dillard*, 55 Miss., 348; *Basset* v. *Nosworthy*, 2 Leading Cas. in Eq. (White & T.), 1.

Though the defense of *bona fide* purchaser is an affirmative one, and must be pleaded and proved by the defendant, proof of payment of the consideration is *prima facie* evidence of the want of notice, and devolves upon the complainant the burden of establishing the notice. *Basset* v. *Nosworthy*, *supra*.

The complainants' counsel insist that, even though Estlin & Co. were purchasers for value, the evidence does not show that the defendant has succeeded to their right, but that he holds under a purchaser who bought under a decree in bank-

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ruptcy against Greaves, and acquired only such right as the bankrupt had. In this, counsel is mistaken. It is true that Greaves was adjudged a bankrupt on his own petition, and in his schedule embraced the land in controversy, together with several thousand acres of other land in which he had only a life-estate, and stated that his interest in all the land was that of a life-tenant, and that the children of his deceased wife were remainder-men in fee; but the sale was not of such interest only as the bankrupt had in the land. Smith, the trustee in the Estlin & Co. security, had advertised the land for sale under the power of the deed of trust, but the sale was, upon the application of the assignee in bankruptcy of Greaves, enjoined by the bankrupt court. Afterwards the assignee and Smith, the trustee, joined in a petition to the court to sell the land. The assignee stated to the court, in a separate petition, that the interest of the bankrupt was only that of a life-tenant; but the decree of sale was that "the interest of said bankrupt, and that conveyed to said trustee in and to the lands" should be sold, and the report of sale shows that the commissioner sold the whole interest in the land.

It is true the purchaser of the land got only such title as the bankrupt had or had conveyed by the deed of trust to secure the debt of Estlin & Co. That interest, as to the greater portion of the land, was only a life-estate, for the reason that the bankrupt could surrender to his creditors only his interest in the land, and because, as to the land other than that now in controversy, Greaves had never had a legal title, but the title was in his deceased wife, and, after her death, in her heirs at law. So that, as to such other lands, the conveyance to Smith, as trustee, passed only a life-estate. But, as to the lands in controversy, the trust-deed, as we have seen, conveyed the fee, and neither the statement of the bankrupt in his schedule nor that of his assignee in his petition could limit it to a life-estate.

It follows, from what we have said, that the defendant, At-

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Statement of the case.

kinson, occupies the position of a *bona fide* purchaser, and, therefore, that complainants can have no relief against him.

The decree of the court below is reversed, and complainants' bill dismissed at their costs.

CITY OF JACKSON v. SOLOMON SHLOMBERG.

1. MUNICIPALITIES. *Code* 1892, *chapter* 93. *Acceptance of code chapter.*

By § 3035, chapter 93, code 1892, declaring that after the chapter became operative, every municipality should be governed by its provisions, but that any municipality might, within twelve months, "elect not to come under the provisions hereof," power was given municipalities, affirmatively, to accept the provisions of the chapter and be governed thereby.

2. SAME. *Effort to rescind acceptance ineffectual.*

Its corporate authorities having formally resolved to accept the provisions of the code chapter, the city of Jackson became bound thereby, and subsequent action of the authorities purporting to rescind the resolution of acceptance, though within the twelve months, was ineffectual.

APPEAL from a judgment of HON. TIM E. COOPER, one of the judges of the supreme court, in a *habeas corpus* proceeding.

The relator, Solomon Shlomberg, was arrested on a charge of violating an ordinance of the city of Jackson relating to the sale of second-hand clothing, and was discharged from custody by the judgment appealed from. The ordinance in question was passed June 24, 1892, in accordance with the provisions of the former charter of the city, but not by a yea and nay vote, as required by § 3007, chapter 93, code 1892. It is conceded that the relator was properly discharged, if at the time mentioned the city of Jackson was governed by the provisions of said code chapter, and not by the old charter. Hence the only questions for consideration are: (1) As to the effect of the resolution of the corporate authorities, passed

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Brief for appellant.

April 12, 1892, accepting the code provisions; (2) the effect of the resolution adopted by them June 7, 1892, rescinding the resolution of acceptance, and rejecting the provisions of the code chapter, the last resolution having been passed prior to the adoption of the ordinance in question. The opinion contains a further statement of the case.

So much of § 3035, code 1892, as is necessary to be considered, is as follows:

"From and after the date that this chapter becomes operative, every municipality in the state shall exercise the powers conferred herein on the class to which it belongs, and shall be governed by the provisions thereof. But an existing municipality, by resolution of its corporate authorities, entered of record and certified to the secretary of state within twelve months after this chapter becomes operative, may elect not to come under the provisions hereof. The secretary of state shall make a record of such certificates received by him. The provisions of this chapter shall not apply to a municipality so signifying the wish of its corporate authorities, unless thereafter, by a majority vote of the electors therein, to be cast at a general or special election for the purpose, it be determined to come under the operation of the chapter."

Brame & Alexander, for appellant.

1. Chapter 93 of the code went into effect April 2, 1892, and was applicable to the city of Jackson and all other municipalities from that date until the *rejection* of the same in accordance with § 3035.

2. Said § 3035 authorizes the rejection of the provisions of the chapter, and directs how this shall be evidenced and certified. There is no provision for *accepting*, and this is not contemplated or required.

3. This being true, the action of the authorities April 12, 1892, purporting to accept the code provisions, was gratuitous and ineffectual.

4. Before the passage of the ordinance of June 24, 1892,

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and within the twelve months, the authorities, by resolution, elected not to come under the provisions of the code chapter. This was done strictly in compliance with the statute, and had the effect to change the legal status of the city. The former charter was in force from and after that time, and the ordinance, under which relator was arrested, was duly passed in accordance with its requirements.

Calhoon & Green, for appellee.

1. The policy was to regard all cities and towns in under the code. The privilege was given to *elect*, within twelve months, not to come in. The right to choose not to come in under § 3035 of the code carried with it the right to elect to come in. Mere non-action for twelve months would be construed as an acceptance. Solemn acceptance during the time ought to have the same effect. This argument is strengthened by a consideration of the fact that an election by the people is only allowed in case of *rejection* by the corporate authorities.

2. Section 3031 of the code contemplates the power of acceptance. It uses the expression, "elect to come in." Section 3037 requires the governor to classify all municipalities under the chapter. This implies the power of acquiescence and acceptance. Otherwise he could not classify for twelve months.

3. If, by mere acquiescence for twelve months, the authorities could accept, and thus bind the municipality, surely they could do so by solemn ordinance.

4. If the authorities could accept, and then rescind and reject, there might be various changes of the status of the municipality, which would lead to great confusion.

CAMPBELL, C. J., delivered the opinion of the court.

This case presents the question whether the city of Jackson is subject to the chapter on municipalities, contained in the code of 1892, or not. That chapter was, by act approved

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April 2, 1892, declared to be in force from that date. On April 12, 1892, the mayor and aldermen of Jackson declared their acceptance of said chapter, and subsequently passed some ordinances with reference to the position of the city, as governed by the chapter on municipalities in the code. On June 7, 1892, an ordinance was adopted by the mayor and aldermen of Jackson rescinding the acceptance of the chapter of the code mentioned, and declaring it null, and they elected not to come under said chapter. This resolution was duly certified to the secretary of state, and by him recorded. The action of the mayor and aldermen, in accepting the chapter, was not communicated by the municipal authorities to any state official, but certain citizens obtained a transcript of the record of the proceedings of the board of mayor and aldermen in accepting the code chapter, and presented it to the governor, who issued his proclamation declaring Jackson a city according to the chapter on municipalities in the code of 1892.

The argument by counsel for the city is that the chapter on municipalities in the code of 1892 was put in force on April 2, 1892, as to all municipalities in the state, with the right in each to "*elect not to come under*" its provisions, by resolution of its corporate authorities, entered of record and certified to the secretary of state within twelve months after April 2, 1892, in which case the municipality should not be subject to the chapter, unless the electors of the municipality should cast a majority of votes for the code provisions at an election provided for in such condition of things; that on April 2, 1892, every municipality became immediately subject to the chapter of the code on the subject, without any action of its corporate authorities, and so continued, unless they elected not to come under it, when it would cease to be under it until, if ever, the electors should demand an election, and decide to come under the code provisions; that the awkward conditions and inconvenient results possible from such vacillation cannot affect the interpretation of the statute, but

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furnish an argument to influence action merely; that no provision is made for acceptance by corporate authorities of the chapter on municipalities, or certifying such action to anybody; and nothing is said in the law about coming under the chapter, and, therefore, the express declaration of the first sentence of § 3035 of the code made every municipality subject at once to the provisions of the chapter. Therefore, it is said that the action of the mayor and aldermen of Jackson, accepting the code chapter, was vain and nugatory, because there is no warrant for it in law; and that their action, electing *not to come under* the chapter, was in pursuance of law, and had the effect to withdraw the city from the operation of the law of municipalities in the code.

There is much ground for this argument, and it cannot be lightly dismissed. It deserves, and has received, careful examination. If the first paragraph of § 3035 of the code stood alone, in full force as expressed, there would be no answer to the argument that every municipality became subject to the chapter by virtue of the act of April 2, 1892, and could get from under it only by the election of its corporate authorities "*not to come under*," made and certified as provided for, and afterwards might get in under the code by the vote of its electors duly certified. The serious consequences of such an interpretation, while not sufficient to justify departure from the language of the statute, justly impel to an earnest search for another view contained in, or consistent with, the language of the law. The will of the legislature is to be sought by considering all it has said on the subject, and necessary implication may modify express language, if the intent of the law-maker is apparent.

It is manifest that the chapter under consideration was framed on the view that it would become immediately operative, as part of the code containing it, and be in full force as to all municipalities, from the time when it should become law, without and independent of any municipal action. There is internal evidence of this, and it is historically true.

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Therefore, the declaration of the first sentence of § 3035, that every municipality shall be governed by this law from the time it becomes operative. But the purpose to subject all municipalities immediately to the provisions of the code, by virtue of its adoption, was abandoned, and it was put in the power of the corporate authorities of any municipality, at any time within twelve months from the date of passing the act, to "*elect not to come under*" the law. The language is not *elect to get out* or from under, but "*elect to come under*," implying that all were from under, and that they might elect to come under. In § 3031 the language is: "*If any city, town or village shall elect to come under*," *etc.* By § 3036, it is declared that certain sections of the chapter shall apply to all municipalities from the time the chapter becomes operative. Why specify certain sections if all were of force? By § 3037, existing municipalities are to be classified according to population, by the United States census of 1890, and it was made the duty of the governor, as soon as this chapter becomes operative as to any municipality, to issue his proclamation, assigning it to its proper class. If the law was at once operative as to all municipalities, it was the duty of the governor to issue his proclamation, assigning every one to its class immediately after the law was passed. Is it conceivable that it was intended that this should occur, and that, after proclamation thus made, and of which the courts are required to take judicial notice—because executive acts are made of record, and thus furnish authentic information—the municipality which was under, might elect not to come under the code provisions, and thereby change its status, render useless and nugatory what had been done, and, after an experience of less than twelve months under the code, elect not to come under, and, thenceforth, be from under, but liable to come under at any time in the future, when a "majority vote" of its electors should declare for it? Section 3039 of the code speaks of a municipality "*which has not come under*," *etc.* Why the various expressions about electing not

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to come under, and coming under the provisions of the chapter, if all were under it by force of the law and regardless of their election? *Election* implies free choice—the power to accept or reject.

The scheme was to have all municipalities governed by the code. The chapter was drawn with that view. Objection was made, and its structure was so altered as to change the scheme, by allowing twelve months to every municipality to elect not to come under. If one should not elect not to come under, it should be under. Unless action should be taken against it, the mere effluxion of twelve months should fix the status of the municipality as under the code. And so solicitous was the legislature to have all municipalities under the code, that provision was made to enable the electors to reverse the action of corporate authorities which should reject the chapter, while no provision was made for getting from under the chapter by the action of electors, if the corporate authorities merely remained silent and permitted the lapse of twelve months.

Manifestly, the legislative desire was to bring all municipalities under the operation of the code chapter, but it was not willing to enforce this wish against the will of the municipality, and so shaped the law as to place it in the power of each to reject, at any time within twelve months, by action of its corporate authorities, subject to be overruled at any time by a majority of the electors at an election provided for. This right to reject carries with it the right to accept, and when the corporate authorities, which might irrevocably come under the chapter by non-action, accept the chapter, there is concurrence of the will of the legislature and the municipality, and the status of the latter is fixed.

We agree with the learned counsel for Jackson in the assertion that there is no middle ground, and that every municipality in the state was at once, by force of the law and without any action, subject to the operation of the code chapter; or that its action was suspended for twelve months,

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in which the municipality might elect not to come under, unless within the time it should relieve the suspense, end the uncertainty, and fix its status by accepting as its fundamental law that which the legislature commended to it, and manifested solicitude for it to accept. We choose the latter view as the better one, fully warranted by the language of the law, and promotive of the legislative purpose, while it avoids the many evils of a contrary view.

The mayor and aldermen had the power to accept the provisions of the code chapter, and from that time Jackson was subject to its provisions.

Affirmed.

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JAMES W. TUFTS v. D. A. STONE.

1. SALE. *Title reserved. Part payment. Right of seller.*

The seller of personal property, who reserves title until the purchase-money is paid, may, at any time after default and before payment in full, retake the property. In such case, he will not hold it absolutely, but merely as security for the amount due. *Dederick* v. *Wolfe*, 68 Miss., 500.

2. RECORD. *Contract reserving title. Code* 1880, § 1293.

Where personal property is delivered to a purchaser, the title being reserved by the seller as security for the price, under a written contract, signed and acknowledged by the purchaser, such contract is recordable as a "reservation or limitation of a use or property, by way of condition, reversion or remainder, or otherwise, in goods or chattels, the possession of which remains in another." Code 1880, § 1293.

3. SAME. *Property used in trade. Code* 1880, § 1300. *Recorded liens.*

Section 1300, code 1880, providing that personal property used or acquired in the business of a trader, under certain circumstances, shall be treated as his, as against his creditors, has no application against the original

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Statement of the case.

seller of such property, who, to secure the purchase-money, reserves title by an instrument signed by the purchaser, and duly acknowledged and recorded.

FROM the circuit court of Lauderdale county.

HON. S. H. TERRAL, Judge.

Replevin by James W. Tufts to recover a soda-fountain and apparatus, distrained for rent by Mrs. D. A. Stone as the property of Martz Bros. The case was tried by the court without a jury, on an agreed statement of facts, the material parts of which are as follows: In March, 1890, plaintiff, Tufts, sold the soda-fountain and apparatus to C. E. Martz, then engaged in business in Lincoln county, Mississippi, the price being $800, to be paid in twenty-five monthly installments of $32 each. The contract was in writing, signed by C. E. Martz, and, after stating the terms of sale, contained the following stipulation: "Possession of said property is to remain with me until default in payment, but title to the same shall not pass to me, but, until all of said notes are paid, shall remain in James W. Tufts." This contract was signed and acknowledged by Martz, and promptly recorded in Lincoln county. Subsequently C. E. Martz removed to Lauderdale county, and, with his brother, S. Martz, leased from appellee, Mrs. D. A. Stone, a store-house, in which they engaged in business as partners, their firm name, as disclosed by the sign, being Martz Bros. The soda-fountain was brought from Lincoln county and placed in the store, and used in the business of said firm. The contract of sale was also recorded in Lauderdale county a short time after the removal of the property.

In December, 1891, Martz Bros. made a general assignment for the benefit of their creditors, and this property, along with their other assets, was turned over to their assignee. Thereupon Mrs. Stone, claiming rent, both in arrears and to become due, distrained and caused certain of the assets in the possession of the assignee, including the soda-fountain, to be seized. Tufts brought this action of replevin therefor,

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Brief for appellant.

and, on the trial, it was agreed that the only issue involved was whether Tufts was entitled to the said property by virtue of said instrument, or whether, under § 1300, code 1880, it should be treated as the property of Martz Bros., and, as such, liable to distress at the suit of their landlord, the appellee.

The judgment was in favor of the defendant, and Tufts appealed.

Section 1300, code 1880, provides that if one transacts business, as a trader, in his own name, without a sign disclosing ownership in another, all the property used or acquired in said business shall, as to his creditors, be deemed and treated as his.

The concluding clause of § 1293, code 1880, which is construed in the opinion, is as follows: "Where any loan of goods and chattels shall be pretended to have been made to any person with whom, or those claiming under him, possession shall have remained by the space of three years, without demand made and pursued by due course of law on the part of the pretended lender, or where any reservation or limitation shall be pretended to have been made of a use or property, by way of condition, reversion, remainder or otherwise in goods or chattels, the possession whereof shall have remained in another, as aforesaid, the same shall be taken, as to the creditors and purchasers of the persons aforesaid so remaining in possession, to be fraudulent within this act, and that the absolute property is with the possession, unless such loan, reservation or limitation of use or property were declared by will, or by writing, proved or acknowledged, and filed for record, as aforesaid."

E. H. Dial, for appellant.

The contract of sale, signed and acknowledged by Martz, the purchaser, was recordable. Code 1880, § 1293. Having been properly recorded, it was notice to the world of the seller's right reserved by it. See Wade on Notice, § 113.

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Section 1300 of the code was designed only to guard against the assertion of secret claims. It cannot affect rights of record. *Dodds* v. *Pratt*, 64 Miss., 123.

Walker & Hall, for appellee.

This case differs from *Hall* v. *Payne*, 64 Miss., 175, only in this, that in that case the contract was not recorded. We contend that the contract in this case is not a recordable instrument. *Ketchum* v. *Brennan*, 53 Miss., 597; *Duke* v. *Shackelford*, 56 *Ib.*, 554.

If recordable, its record does not meet the requirements of § 1300, code 1880. It prescribes that ownership must be disclosed by a sign—not by registration. This statute will be enforced as written. *Quinn* v. *Myles*, 59 Miss., 379; *Wolf* v. *Kahn*, 62 *Ib.*, 819. This case is condemned by both the letter and spirit of said statute.

WOODS, J., delivered the opinion of the court.

Was the title to the property in controversy in the appellant, and possession and use in Martz? Or had Martz such title as would have authorized its mortgage by him, in any event? Can it be said that, under the recorded contract made by him, he may be regarded as substantially a mortgagor in possession?

The case is freed from doubt as to the proper answers to these inquiries, if, refusing to stick in the letter, we look through mere forms, and ascertain what the intent of Tufts and Martz was when the contract was entered into. It is certain that Martz, by his purchase, was to secure the soda-fount and apparatus, and Tufts was to have, as compensation, the price of $800, evidenced by thirty-two promissory notes of the purchaser for $25 each, payable monthly, and that he reserved title simply as a security for the purchase-price. The contract distinctly declares that "said notes [meaning Martz's thirty-two notes] were given by me, Martz, for certain soda-water apparatus conditionally purchased of said

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Tufts." Martz had such title and interest in the property when this litigation arose as would have been protected in a court of equity. He had paid to Tufts about $500 in pursuance of his agreement, and would the latter be permitted, in equity, to retain this $500 and retake absolutely, as his own, the property for which the $500 had been paid? Rather, would not Tufts have been allowed to resort to his security only so far as the same might be necessary to satisfy the balance due from Martz? Suppose Martz had paid thirty-one of the thirty-two notes, and by disaster had been unable to pay the remaining note of $25, would any court of conscience tolerate an assertion of Tufts' right to hold on to the $775 already paid him, and to take as his own the property also? He may resort to the security he has taken, by reservation of title, for payment of the balance due him just as any mortgagee may in like case. But the case falls, in its facts and features, wholly within the rule announced in *Dederick* v. *Wolfe*, 68 Miss., and renders further remark superfluous.

While the trader must unite in himself title and possession of property used in his business, he may surely encumber the same by mortgage, and, with the instrument acknowledged and recorded, his mortgagee must not be stripped of his rights under the mortgage. See *Dodds* v. *Pratt*, 64 Miss.

Treating the written and acknowledged and recorded contract as in its essentials a mortgage, it was properly recordable, and excluded all idea of its being classed with those secret claims which it was the purpose of § 1300, code 1880, to disallow. In its form and letter, too, we think it was properly subject to recordation, for it purports to be a reservation or limitation of a use or property, by way of condition, reversion or remainder in goods or chattels, the possession whereof is in another, and is embraced in the concluding clause of § 1293, code 1880. This conclusion is implied plainly in *Thomas* v. *Grand Gulf Bank*, 9 S. & M., 201.

Reversed.

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Brief for appellant.

M. C. HAMBRICK v. E. C. DENT.

1. PRACTICE. *Judgment by default. Plea on file. Error.*

A judgment by default, rendered when there is a plea undisposed of which is a full answer to the declaration, will be reversed.

2. SAME. *Code* 1880, § 1433.

Such error is not cured by § 1433, code 1880, which applies only to criminal cases. *Duncan* v. *Supervisors*, 64 Miss., 38, explained.

FROM the circuit court of Noxubee county.

HON. S. H. TERRAL, Judge.

E. C. Dent filed his declaration in the circuit court against M. C. Hambrick and three others, on their joint promissory note. The record contains only the declaration, which is in usual form and unsworn, a copy of the note, a plea of general issue by all the defendants, which is filed, and a subsequent judgment by default, wherein it is recited that the suit is dismissed as to two of the defendants. The date of the indorsement on the plea shows it to have been filed on the third day of the term, and no leave of court or consent to the filing out of time is shown; nor does the record show any motion to strike out the plea, or that it was disposed of in any way.

Mrs. Hambrick, one of the defendants against whom judgment was taken, appeals.

Rives & Rives, for appellant.

It was error to render judgment by default while the plea was on file. *Price* v. *Sinclair*, 5 S. & M., 258; *Wright* v. *Alexander*, 11 *Ib.*, 417; *Pool* v. *Hill*, 44 Miss., 312; *Taylor* v. *McNairy*, 42 *Ib.*, 276.

It will be presumed that the plea was filed by leave of court. *Price* v. *Sinclair*, *supra*.

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Syllabus.

T. W. Brame, for appellee.

The plea was filed out of time, without any leave of court, so far as appears, and was properly disregarded.

If it was error to render judgment without disposing of the plea, it was necessary to object in the lower court, and present the error by special bill of exception. *Duncan* v. *Board Supervisors*, 64 Miss., 38.

CAMPBELL, C. J., delivered the opinion of the court.

The judgment in this case must be reversed, because it was rendered when there was a plea undisposed of which is a full answer to the declaration. Section 1433 of the code of 1880 applies to criminal cases only. Its citation in *Duncan* v. *Supervisors*, 64 Miss., 38, was an inadvertence. No statute authorizes a judgment in the state of case shown by this record, and such a statute would be intolerable.

Reversed and remanded.

W. C. ELLIS *v.* D. H. JONES, AGENT.

1. LETTER OF GUARANTY. *Debts to be created. Acceptance.*

One who writes to another that he will be responsible for advances to be made in reasonable amounts to his tenants, is entitled to notice, within a reasonable time, that the offered guaranty is accepted. If it is not given, he will not be bound thereon. *Williams* v. *Staton*, 5 Smed. & M., 347; *Montgomery* v. *Kellogg*, 43 Miss., 486.

2. LANDLORD'S LIEN. *Supplies advanced by another. Guaranty.*

Under § 1301, code 1880, giving a landlord a lien on crops for advances made by him to his tenant for supplies, the lien does not exist if the landlord does not, either directly or through another, make the advances, but merely guarantees payment for supplies advanced to the tenant by another. To support such lien, the relation of creditor and debtor must exist between the landlord and tenant.

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Brief for appellee.

FROM the circuit court of Rankin county.

HON. A. G. MAYERS, Judge.

This action was brought by D. H. Jones, as agent for his wife, Emma Jones, to recover of W. C. Ellis $129.79, the value of certain agricultural products grown upon her land, and upon which she claimed, under § 1301, code 1880, a lien to that amount for supplies, which products had been purchased by Ellis. The evidence is sufficiently stated in the opinion. There was a peremptory instruction for plaintiff. Judgment accordingly, and defendant appeals.

J. R. Enochs, for appellant.

The supplies were not furnished by plaintiff through the firm of D. H. & H. Jones. There was no agreement between plaintiff and Williams, the tenant, that supplies were to be thus furnished. On the contrary, Williams knew nothing of the arrangement between plaintiff and said firm. The debt was that of the tenant to said firm. Plaintiff merely became responsible for its payment, and, after suit begun, the account against Williams was charged to plaintiff's account. Under such circumstances, I submit no lien arose. *Clanton* v. *Eaton*, 8 So. Rep. (Ala.), 823.

It was error to exclude the trust-deed. If it be true that D. H. & H. Jones advanced the supplies as agent for plaintiff, taking the trust-deed was a waiver of the landlord's lien. *Gaines* v. *Keeton*, 68 Miss., 473.

Williamson & Potter, for appellee.

It is unquestioned that plaintiff was the landlord; that the crops were grown on the land rented by her to Williams; that he owed her for rent and supplies, and that Ellis appropriated the crops, knowing that Williams was such tenant, and owed for the rent and supplies. In such case, Ellis is clearly liable for the value of the crops so purchased. *Cohn* v. *Smith*, 64 Miss., 816; *Newman* v. *Bank*, 66 *Ib.*, 323; *Dunn* v. *Kelly*, 57 *Ib.*, 825.

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The agreement at the outset was that Mrs. Jones was to furnish supplies as landlord, and they were so furnished, as the tenant testifies.

The trust-deed was properly executed. D. H. & H. Jones were not the agents of plaintiff. The land was not leased by them. They are making no claim under the trust-deed. They furnished the supplies on the order of Mrs. Jones, for which she had to pay whether the tenant paid or not. The facts are not like those in *Gaines* v. *Keeton*, 68 Miss., 473.

COOPER, J., delivered the opinion of the court.

The peremptory instruction given for the plaintiff should have been refused, and that asked by the defendant should have been given.

There is no evidence that the plaintiff ever advanced any supplies to her tenant, Lee Williams.

The evidence is that the firm of D. H. & H. Jones, of which her husband was a member, advanced supplies to Williams, taking as security a deed of trust on his crop and other property, and, after this suit had been instituted, charged to Mrs. Jones the amount of Williams' account. Mrs. Jones, on January 1, 1891, wrote to D. H. & H. Jones that "if any of the tenants, croppers or laborers on any of my places in Hinds or Rankin counties, who may desire supplies for the year 1891, please furnish them in a reasonable quantity, and I will be responsible for the same." At most, this was a letter of guaranty in reference to debts to be contracted by the tenants in indefinite amounts, and she was entitled to notice of its acceptance within a reasonable time, without which she was not bound. *Williams* v. *Staton*, 5 S. & M., 347; *Montgomery* v. *Kellogg*, 43 Miss., 486.

There is no evidence that Mrs. Jones had any notice that her guaranty had been accepted by D. H. & H. Jones until after this suit had been brought.

But, if notice had been given, and Mrs. Jones' liability fixed for the debts contracted by the tenants, she would not

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have had a lien as landlord for the supplies advanced. The statute, code 1880, § 1301, provides that "every lessor of land shall have a lien on all the agricultural products of the leased premises, however and by whomsoever produced, to secure the payment of the rent, and the fair market value of all advances made by him to his tenant for supplies for the tenant and others for whom he may contract, and for his business carried on upon the leased premises."

The lien given by the statute for supplies is to secure a debt due to the landlord, and the existence of such debt is necessary to the existence of the lien. Neither the letter nor spirit of the statute warrants its application to debts due by the tenant to third persons, even though the landlord be liable as surety or guarantor for the tenant. The landlord here was not creditor to the tenant. She was, if any thing, debtor with the tenant to D. H. & H. Jones. These creditors had secured from the tenant a deed of trust upon his crop and other property, and, upon payment of the tenant's debt by Mrs. Jones, the guarantor, she, upon familiar principles, was subrogated to the security held by the creditors against the principal debtor. But she does not, in this suit, endeavor to enforce the security thus obtained. Upon her objection, the court excluded evidence of its existence when offered, and permitted a recovery by the plaintiff as landlord enforcing a right which can only arise from the existence of the lien given by § 1301 of the code.

We do not decide that the lien exists only when the landlord deals directly with the tenant. If the landlord makes advances through a third person to the tenant, we see no reason why the lien should not exist; but, in any event, the circumstances must be such as to create a debt due from the tenant to the landlord. It is not sufficient that the tenant and landlord be indebted to such third person.

The court did not err in excluding as evidence the deed of trust executed by Williams, the tenant, to D. H. & H. Jones. If the plaintiff had sought recovery upon the theory that D.

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H. & H. Jones had made the advances as her agent, the excluded evidence would have been competent, and would have brought the case within the principle of the decision in *Gaines* v. *Keeton*, 68 Miss., 473; but, as we interpret the proceedings, the plaintiff contended, and the court ruled, that Mrs. Jones was entitled to maintain the suit, because she was liable, as guarantor, for the debt due by the tenant to D. H. & H. Jones for supplies advanced by them. Under such circumstances, the landlord has no lien.

The judgment is reversed, and cause remanded.

N. T. BAGGETT v. J. C. WATSON.

BOND FOR COSTS. *Validity. Absence of affidavit. Code* 1880, § 2360.

A bond for costs is valid, although given during the progress of a suit, and without any affidavit, motion and order therefor, as provided by code 1880, § 2360, as the obligors will be deemed to have waived these requirements. Such bond, being one provided for by law, is not voluntary.

FROM the chancery court of Sharkey county.

HON. CLAUDE PINTARD, Chancellor.

Appellee, Watson, filed this bill against N. T. Baggett, chancery clerk, and H. J. Wright, sheriff of Sharkey county, to enjoin an execution issued against one Shelby as principal and appellee as surety, on a bond for costs given during the progress of a chancery suit in which Shelby was complainant.

The ground of invalidity alleged against the bond is that it was executed after the suit had begun, and merely upon the demand of the chancery clerk, without any affidavit as to non-residence or insolvency, or motion and order therefor, as provided by code 1880, § 2360, the contention of complainant, the surety on said bond, being that it was voluntary, and therefore not binding. The bill further shows that the costs

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as taxed, and the execution therefor, exceed somewhat the penalty of the bond, but there was no offer to pay the excess.

The court overruled a demurrer to the bill, and from this decree defendants appeal.

M. Marshall, for appellants.

The provisions for an affidavit, motion and order for security for costs are entirely for the protection of the complainant, and he had a right to waive them, and that is what was done.

The cases of *Besancon* v. *Shirley* and *Overstreet* v. *Davis* are not in point. The court looks to the object of the statute, not its words. See *Kyle* v. *Stinson*, 13 Smed. & M., 301; *House* v. *Bierne*, 5 *Ib.*, 622.

The bond is not voluntary. It is an official bond provided for in judicial proceedings. Murfree on Official Bonds, § 36.

The obligors are estopped to dispute the validity, because they executed the bond, and it served the purpose intended, and because the decree thereon should have been objected to at the time or appealed from.

McLaurin & McLaurin, for appellee.

The execution against the surety is for a sum in excess of the penalty of the bond. As to the excess, the bill is, of course, maintainable. It therefore has equity on its face.

After suit begun, the clerk had no right to exact security for costs without making the affidavit required by § 2360, code 1880, and procuring an order of court. *Besancon* v. *Shirley*, 9 Smed. & M., 457.

It was not a valid statutory bond, and the common law, as modified by statutes, will not sustain a bond, or any other contract, without a sufficient consideration. So the bond was voluntary, and not binding. *State* v. *Bartlett*, 30 Miss., 624; *Carothers* v. *Leigh*, 60 *Ib.*, 258. The case of *Overstreet* v. *Davis*, 24 Miss., 393, is decisive of this.

CAMPBELL, C. J., delivered the opinion of the court.

The demurrer should be sustained, because the bill is main-

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tainable only as to the excess in the amount of the decree over the penalty of the bond, which was obligatory, notwithstanding the absence of a motion and affidavit, and order of court; for, since the law provides for security for costs upon such terms, and the security was given, without requiring the precedent steps prescribed by law, the party giving the security must be held to have waived them, and to be bound as if they had been taken. A totally different question was presented in *Overstreet* v. *Davis*, 24 Miss., 393, and it can have no influence in this case.

The bond here given was not *voluntary*, as it was provided for by law.

The party could not be required to give security for costs, except in the mode prescribed; but, yielding to the demand, and giving security, and thereby relieving from the necessity of an affidavit and motion, it is not allowable to insist that he is not bound, and the surety is bound because the principal is.

Reversed, demurrer sustained and cause remanded.

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T. E. RICHIE, ADMINISTRATOR, *v.* J. S. DUKE.

HOMESTEAD. *Allotment. New selection. Code* 1880, §§ 1251, 1252.

Where land is levied on under execution, and the judgment debtor has set off to him a part of it as a homestead, the remainder is subject to sale, and he cannot afterwards, and before sale, dispose of the homestead so allotted to him, and move on the other land and claim a homestead therein.

FROM the circuit court of Lee county.

HON. LOCK E. HOUSTON, Judge.

Appellee, Duke, owned and, with his family, resided upon a tract of land containing 160 acres, which was levied on under an execution issued on a judgment in favor of appel-

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lant. The land was claimed as exempt, and the sheriff took steps, under § 1251, code 1880, to have the homestead allotted. The freeholders set apart as exempt the west half of the tract, which embraced the dwelling and all other buildings. The east half of the land was then advertised for sale under the execution, when the defendant sold and conveyed to one Lewellen the land so allotted to him as a homestead, and, having built a cabin on the other 80 acres, he moved upon it before the sale day, and asserted the right to hold that as a homestead. He moved the court to quash the levy as to this land, on the ground that it was exempt, and an issue as to this was submitted to a jury. On the trial, the above facts were shown. The evidence also showed that there was a trust-deed on the entire tract, and that the west half, which was allotted as a homestead, was sold to Lewellen to satisfy a debt secured by this deed. It also appeared that the defendant took no part in the allotment proceedings.

The debt on which the judgment was founded, was contracted prior to the act of 1882, which increased the homestead exemption from 80 to 160 acres. The court refused to give a peremptory instruction to find for plaintiff, but, among instructions, gave the following at the instance of plaintiff:

"1. The court charges the jury for the plaintiff that the sale of the west half of the land, in the case named, having been made after the levy of plaintiff's execution had been made, and after the said west half had been set apart to the defendant as a homestead, and after the said east half of said land had been advertised for sale to satisfy plaintiff's execution, the said defendant had no right to move on the east half of said land and claim it as exempt from plaintiff's execution; and the levy thereon by the sheriff was legal, and the motion of the defendant to quash the said levy should be overruled, and the jury will find for the plaintiff that the levy is good."

Verdict and judgment for defendant. Motion for new trial overruled. Plaintiff appeals.

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Brief for appellee.

Clayton & Anderson, for appellant.

1. The debt having been contracted prior to the act of 1882, Duke was only entitled to an exemption of 80 acres. *Lessley* v. *Phipps*, 49 Miss., 790; *Johnson* v. *Fletcher*, 51 *Ib.*, 628; 96 U. S., 595.

2. All the land having been levied upon, and the homestead having been set apart, the debtor could not sell or abandon this and claim another homestead. *Trotter* v. *Dobbs*, 38 Miss., 198, is not an authority for the proposition that this can be done. That and subsequent cases, holding that the debtor may acquire and claim the homestead in land at any time prior to the sale thereof, does not authorize one who has a homestead, and is occupying it as such, to sell that and claim another, thus, by repeated sales, defeating entirely the liens of judgment creditors. Such a scheme or fraud as this could not be tolerated. The homestead right, instead of being a shield, would be converted into an instrument of fraud to defeat creditors. On this point, see *Rutherford* v. *Jamieson*, 65 Miss., 219; *Stone* v. *Darnell*, 20 Texas, 11; *Woodall* v. *Rudd*, 41 *Ib.*, 375; *Willis* v. *Matthews*, 46 *Ib.*, 478; Thompson on Homesteads, §§ 225, 319, 419, 648, 856.

On the undisputed facts, the court should have given the peremptory instruction in favor of plaintiff. We ask for a reversal, and that judgment be entered here overruling the motion to quash the levy, and directing the issuance of execution against Duke and his sureties. Code 1880, § 1756.

J. L. Finley, for appellee.

1. Exempt property may be disposed of as other property. Code 1880, § 1257. One may become the head of a family after judgment and before sale. He thus acquires a right to hold exempt property. *Trotter* v. *Dobbs*, 38 Miss., 198; *Irwin* v. *Lewis*, 50 *Ib.*, 363.

Duke had nothing to do with setting apart one-half the land as a homestead, and was not concluded thereby. He had a right to move on the other land and claim it as a home-

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stead at any time before sale, and this right he exercised. The question involved is purely a legal one, and is settled by the decisions above referred to. If, as opposite counsel contend, the debtor was seeking to perpetrate a fraud, that matter could only be reached in a court of equity.

2. Opposite counsel insist that, under the authority of *Lessley* v. *Phipps*, the debtor is only entitled to an exemption of 80 acres. The court can as easily overrule that case as it did *Stephenson* v. *Osborne*, 41 Miss., 119. But, be that as it may, Duke only claims now, as his homestead, 80 acres, and is living on it with his family. The judgment is right.

CAMPBELL, C. J., delivered the opinion of the court.

This court has felt bound to adhere to *Trotter* v. *Dobbs*, 38 Miss., 198, and so declared in *Jones* v. *Hart*, 62 Miss., 13; but, erroneous and mischievous as that decision was, it was never supposed to be capable of being misconstrued and perverted, as has been done in the case before us. It is true that in *Trotter* v. *Dobbs* the court, sticking in the bark, seized upon the language of the statute declaring that certain realty shall be exempt from "seizure *or sale*" as authorizing the holding that the execution debtor, resident on the land *bound* by the judgment against him, might marry on the day appointed for sale under the levy, which made the lien specific, and thereby unbind the land and defeat the lien, and render the sale nugatory; but, unsound as that is, it is inconceivable to us how that could be supposed to entitle one whose homestead was set off to him in pursuance of §§ 1251, 1252 of the code of 1880, afterwards to abandon it, move on another tract of land, sell that set off, and then successfully claim as his homestead the new selection. The claim of Mr. Duke is preposterous, and unallowable. When the sheriff levied the execution and proceeded in accordance with the statutes, and the commissioners set off certain land to Mr. Duke as his homestead, "the remainder of the land" levied on was subject to be sold. This is the express provision of the statute,

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and no act of the defendant, in making another selection of land for his homestead, could defeat the sale.

The learned judge below, with a correct view of the law, as shown by granting the first instruction for the plaintiff, refused to end the controversy by deciding for the plaintiff, as he should have done.

Reversed, and remanded for further proceedings in the court below in accordance with this opinion.

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D. W. MOORE *v.* J. N. BRADFORD.

1. HOMESTEAD. *Abandonment. Intent to re-occupy. Code* 1880, § 1256.

Ceasing to reside on a homestead renders it liable to debts, unless the removal be temporary, by reason of casualty or necessity, and with the purpose of *speedily* re-occupying as soon as the cause is removed. Code 1880, § 1256; Code 1892, § 1981.

2. SAME. *Casualty or necessity. Removal. Intent to re-occupy.*

The intent to re-occupy can have no influence on the question of the existence of the casualty or necessity constituting cause of removal. Both the intent to speedily re-occupy and cause of removal must exist to protect the homestead. If there is no sufficient cause of removal, proof of intent to re-occupy is immaterial.

3. SAME. *What is casualty or necessity. Abandonment. Case.*

Where a debtor, in order to get employment, leaves his family in charge of the homestead, going to another county, and shortly afterwards his wife visits him, intending shortly to return to the home, but is taken sick and remains with the husband, the place then being rented out and occupied by tenants for several years, the absence is not by reason of "casualty or necessity," and the property, during such absence, becomes liable to sale under execution, though the debtor did not intend to abandon his homestead, and had not changed his citizenship or place of paying poll and street taxes. *Thompson* v. *Tillotson*, 56 Miss., 36.

FROM the circuit court of Holmes county.
HON. C. H. CAMPBELL, Judge.

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Statement of the case.

Ejectment by appellant, Moore, against appellee, Bradford, for a lot of land in the town of Goodman. Bradford owned and occupied the place as his homestead. In August, 1888, he left Goodman and went to Greenville, Miss., seeking employment. He obtained a position there, being employed by a railroad company at a monthly salary. His wife was left in charge of the home. About the first of January, 1889, she went to visit him at Greenville, intending only to remain until summer, which was the sickly season at Greenville. In a few months she was taken ill, and remained there sick three or four months. When she went from Goodman the house was left in charge of an agent, who was instructed to rent it by the month, and it was rented. There was evidence tending to show that the tenant, who paid by the month, agreed to surrender the house at any time Bradford should desire to re-occupy it. Both Bradford and his wife testified that they did not intend to abandon their home, except temporarily. Bradford was not registered as a voter, except at Goodman, and continued a member of the Masonic lodge and Knights of Honor there, and paid poll and street taxes there. In October, 1889, his wife returned to Goodman and remained a short while. She then went back to Greenville, and remained with her husband until February, 1890, when she returned to Goodman, and resided with her mother on a place belonging to the latter. Meantime, October 7, 1889, the lot in controversy was sold under execution against Bradford, and was purchased by Moore. The fact of sale was not known to Bradford at the time, and he continued to reside at Greenville until the spring of 1890. He testified that he went there because he could do better, and remained as long as he had employment; that he moved on the place again in March, 1892, though he could have gotten possession at any time after January 1, 1890; that he had no other home than this. When he went to Greenville he refused an offer to purchase it. He defended upon the ground that the property was exempt as a homestead.

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Brief for appellant.

On the trial, the above facts, in substance, were shown.

The following instructions were given for the defendant:

1. That the temporary removal from a homestead, from casualty or necessity, with the intent to re-occupy it, does not subject such homestead property to the debts of the owner; and, if the jury believe from the evidence that J. N. Bradford had been living on said lot in controversy as his homestead, and that about the first of January, 1889, he, with his family, went to Greenville to live, but that he did not intend to abandon said lot as his homestead, they will find for the defendant, although they may further believe from the evidence that he rented out said lot for the years 1889 and 1890.

2. That the sole question presented to the jury is the question of intent with which the removal from the premises was made by the defendant; and, if the jury believe from the evidence that his said removal was regarded by him as temporary, and that he intended to return and occupy said lot in controversy as his homestead, and not acquire a homestead elsewhere, but did return and occupy said lot in controversy as his homestead, they will find for the defendant, though the jury may believe that in the meantime, between his removal and his re-occupancy, he had rented out said property.

Judgment for defendant. Plaintiff appeals.

Section 1256, code 1880 (§ 1981, code 1892), is as follows:

"Whenever the debtor shall cease to reside on his homestead, it shall be liable to his debts, unless his removal be temporary, by reason of some casualty or necessity, and with the purpose of speedily re-occupying it, as soon as the cause of his absence can be removed."

Noel & Tackett, for appellant.

The case is controlled by the decision in *Thompson* v. *Tillotson*, 56 Miss., 36. In that case, the removal was temporary, and *animo revertandi*. Here the tenant remained in possession from the first of 1889 until March, 1891. At the

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Brief for appellee.

time of the sale, Bradford did not reside on the property, and he was not absent by reason of any casualty or necessity. Code 1880, § 1256.

The instructions given for defendant are erroneous. They do not express the statutory requirement that the absence must be *temporary*, by reason of casualty or necessity and with the purpose *speedily* to re-occupy.

Hooker & Wilson, for appellee.

1. The testimony precludes the idea that there was any abandonment of the homestead. Bradford went merely to get employment, leaving his family in possession of the homestead. Shortly afterwards his wife went to visit him, intending to return to the home, but was prevented by sickness, and the house was temporarily rented. Bradford never changed his citizenship or place of paying poll-tax, lodge dues and the like.

The homestead laws are to be construed liberally, for the protection of the families of unfortunate debtors. Here there was no such abandonment as made the property liable.

2. If mistaken in this, then we submit that the case comes within the statute which protects the homestead in cases of temporary removal by reason of casualty or necessity, with the purpose on the part of the debtor speedily to re-occupy. The defendant was poor, and sought employment elsewhere. Unfortunately, his wife was taken sick while visiting him, and was unable to return to the home. Before his return, the place was sold at a sacrifice. It is for the jury to decide whether the absence is by reason of casualty or necessity. Here the question was fairly submitted to the jury, and the court below refused to disturb the verdict. Defendant's instructions were qualified by those given for plaintiff.

Renting the property, the time of absence and the like, are only circumstances to show the intent of the debtor; they are not conclusive. Thompson on Homesteads, §§ 272–287.

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Opinion of the court.

CAMPBELL, C. J., delivered the opinion of the court.

The first instruction for the defendant is not accurate, as an expression of the law on the subject, because it omits the statutory requirement of the purpose of *speedily* re-occupying the homestead, and for the further reason that it makes the intent of the party not to abandon the homestead the test of its liability to be taken for debt, without regard to the circumstance of his having ceased to reside on it.

The second instruction for the defendant is subject to the same criticism as to the intent of the person who ceases to reside on his homestead, as to removal and purpose to re-occupy the homestead.

The intent of the party *as to speedy re-occupancy* of a homestead on which he has ceased to reside because of some casualty or necessity, is an important factor in determining whether temporary removal renders the homestead liable to creditors; but the intent of the party can have no influence on the question of the existence of such casualty or necessity as justifies temporary removal without exposing the homestead to creditors. If one ceases to reside on his homestead, without some casualty or necessity to cause his removal, it becomes liable to his debts. The question in such case is; *Was the ceasing to reside on the homestead caused by some casualty or necessity such as the law contemplates?* If this question is answered in the affirmative, the next question is; *Was the removal temporary, and with the purpose of speedily re-occupying the homestead as soon as the cause of his absence can be removed?* In determining the first question, the intent of the party as to removal or re-occupying is not a matter for consideration. In the other, it is an important subject of inquiry.

Bradford ceased to reside on his homestead. The evidence does not disclose any such casualty or necessity for this as the law contemplates. *Thompson* v. *Tillotson*, 56 Miss., 36. Therefore, the intent or purpose he had, as to re-occupying, can have no influence. The non-existence of the conditions making it possible for him to cease to reside on his home-

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Statement of the case.

stead, without rendering it liable for debts, made it immaterial what his purpose was. The fact of ceasing to reside on the homestead, in the absence of casualty or necessity, precluded any further inquiry. Ceasing to reside on a homestead is rather matter of fact than of intent.

Reversed and remanded.

E. J. HALL *v.* D. W. MOORE.

1. WITNESS FEES. *Execution therefor. Unsuccessful party. Code* 1880, § 1595.

Section 1595, code 1880, provides that a party recovering costs may file the certificates of his witnesses, the fees of whom he has paid, and have the same included in an execution for costs. This does not apply to the fees of witnesses for an unsuccessful party. They have merely a claim against him, enforcible by suit.

2. COSTS. *Execution for. Improper use of process. Vacating sale.*

One at whose instance an execution for costs is issued, having, by agreement with the officers of court, control of the execution, stands, as the officers would, in the attitude of a public trustee, and cannot use the process for oppression or speculation. He must proceed with good faith, and after notice to the debtor if his residence can be ascertained by reasonable diligence. If he disregards this, and buys under the execution property of the debtor without his knowledge, and at a sacrifice, equity will vacate the sale. *Davis* v. *Bell*, 57 Miss., 320.

FROM the chancery court of Holmes county.

HON. T. B. GRAHAM, Chancellor.

Under an execution for costs, issued on the judgment against appellant mentioned in the opinion of the court, the land in controversy was sold to the appellee, Moore, who brought ejectment for the same. The bill in this case was filed by appellant to enjoin the prosecution of the action of ejectment, and for cancellation of the sheriff's deed. Decree for defendant, from which this appeal is prosecuted. The opinion contains a further statement of the case.

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Opinion of the court.

Hooker & Wilson, for appellant.

The record shows a scheme on Moore's part to take advantage of the temporary absence of Mrs. Hall and buy in her property at a sacrifice. He had no interest in the judgment, but assumed control of the execution for costs, and bought the property of a neighbor at a grossly inadequate price. His conduct amounted to a fraud, and should be relieved against by a court of equity. *Reynolds* v. *Nye*, Freeman's Ch. R. (Miss.), 462; Freeman on Ex., § 308 *et seq.*; Rorer on Jud. Sales, § 855, and notes.

The principle for which we contend is recognized in *Hopton* v. *Swan*, 50 Miss., 545; *Hall* v. *Moore*, 68 *Ib.*, 527.

Noel & Tackett, for appellee.

The appellant knew all about the suit in which the execution for costs issued, and, from the evidence, it is manifest that she knew of the levy upon the property, and that it would be sold. There is no evidence of collusion or fraud in the issuance of the execution and the sale of the property. The fact that it did not sell for a larger sum, was probably the result of fear that the purchaser would get a lawsuit; and then there were questions as to the homestead exemption.

It has never been held that mere inadequacy of price will vitiate a judicial sale. On this point, see Freeman on Ex., § 308, which states that inadequacy alone is not sufficient, unless it is so inordinate as to indicate some mistake or fraud for which the purchaser is responsible, or some misconduct or fraud on the part of the officer conducting the sale. The same authority holds that the mistake or surprise upon which sales are sometimes avoided must be traceable to some wrongful act on the part of the purchaser or the execution creditor.

WOODS, J., delivered the opinion of the court.

The appellee was not entitled to have execution issued to enforce collection of the amount due him by appellant for

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witness fees. The fees due him were no part of the taxable costs for which execution might issue. The fees due appellee and the witness, Norval, were for attendance under subpœna issued at appellant's direction. Appellee and Norval were her witnesses, and had simply a valid claim for the amounts so due them against appellant (if the claims had not been barred by the statute of limitation), on which they might have brought suit, just as any other creditor by simple contract. Section 1595, code 1880, in its provision that "the party paying any witness attending on his behalf may file the certificate given by the clerk or commissioner among the papers in the cause, and, if he recover costs in the cause, the amount shall be taxed in the bill of costs," has no application to witnesses of the unsuccessful litigant who have never been paid. The appellant did not recover costs in the suit in which the appellee and Norval were her witnesses. She was unsuccessful in that litigation, and the costs were adjudged against her. Under section 1595, her witnesses could sue for, and recover from her, the amounts specified in the clerk's certificate of their attendance, and such amounts were not embraced in the judgment, as part of the costs in the original suit.

The attempt of appellee, therefore, to use the process of the court to coerce payment of such witness fees was without the semblance of authority in law, and any rights to or interest in the land in controversy thus acquired must fall at the touch of appellant's attack.

But refuge may be sought to be taken by appellee in the uncontroverted fact that he had some agreement with Hoskins, the then sheriff, and, perhaps, with Oltenberg, the clerk, by which he was given control of their costs, for which execution might issue, and that he stood in their room and stead in taking out execution and having it levied and appellant's property sold. Let us look briefly at the facts disclosed by the evidence which give support to the averments of the bill.

The appellant is a woman—a widow—unfamiliar with the

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forms of business. At the conclusion of the original suit, judgment was rendered against her that she restore to her adversary the stock of goods involved in that controversy, and that, on failure to do so, execution issue against her and the sureties on her claimant's bond, for four hundred dollars, the value of said stock of goods, and for costs. The stock of goods was restored under the judgment, and the same fully satisfied, except as to the costs, amounting to nearly sixty dollars. No steps were taken to enforce the judgment for costs from the date of rendition of judgment, 1881, until 1887, when execution was issued, and returned indorsed by the proper officer, "no property found," etc. In August, 1889, an *alias* execution was issued and levied upon the lot in controversy, under appellee's direction, but it was not sold thereunder. In September, 1889, another execution was issued, also under appellee's direction, and likewise levied on the lot of appellant, and upon another lot, the property of one Bradford, one of the sureties on the claimant's bond in the original suit, and against whom judgment had gone, as such surety, on the determination of that litigation. Both of these lots thus levied upon were improved residence lots, and, for many years prior to the year 1889, had been used and occupied by appellant and Bradford as homes, and were worth, appellant's from $600 to $800, and Bradford's from $400 to $600. Appellant's house and lot were, at the time of the levy, rented for $120 per annum, two rooms in the residence being reserved by appellant for her use, and Bradford's house and lot were rented for about $75 per annum, or at that rate. Appellant and appellee lived in the same town—Goodman—in Holmes county, and had so lived for many years. In 1889 appellant left her home, temporarily, to visit a daughter living in Greenville, Miss., and was unexpectedly detained in attendance upon the daughter, because of serious and protracted illness. Whilst so absent, the property of appellant, and that of her surety, Bradford, as already set out, was levied upon under execution taken out and executed by

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appellee's direction, when appellee became the purchaser, bidding $25 for appellant's lot, and $32.50 for Bradford's lot, and took conveyance from the sheriff to himself for both. The appellant had no notice of any purpose to sell her property, and only learned of it after the sale during her temporary absence, which absence the appellee was then aware of. No attempt was made by appellee, or the officer whom he represented, to advise appellant of the peril to which it was designed to subject her home—the only property she had—though appellant and appellee lived in the same town, and her absence was known to him, and she might have been easily and speedily communicated with in Greenville. It is undisputed, too, that on appellant's return to her home, after being advised of its sale, appellee endeavored to ignore and disregard appellant, when she approached him in pursuance of an appointment which they had made to meet and arrange the matter. The statement of the bill that appellant was not aware that there was against her a judgment in the long-buried case in which she was defeated, and that, if she had known her property had been levied upon to satisfy such ancient judgment for costs, or had even known that she was liable for the same, she could and would have paid it, is undenied.

Contenting ourselves with this recital of the material matters shown by the evidence, or not challenged by appellee, we have this case: The levy and sale under the direct order of a person confessedly standing, or attempting to stand, in the place of officers who had a judgment for not more than $36.25, and perhaps for less, of two properties—one worth $600 to $800, for $25; and the other, worth from $400 to $600, for $32.50, an inadequacy of price so great as to shock the average conscience. We have, moreover, an utter absence of any effort to coerce payment under legal process for about eight years, during which time appellant was at her home, and in position to satisfy the officers' costs, if such effort had been made, whereby she was lulled into forgetfulness of the

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little judgment for costs, and into false security from attack thereunder. After eight years, on the occasion of the temporary absence of this appellant at her daughter's sick bedside, we find a remarkable quickening of diligence by the appellee in his efforts to secure the officers' costs (for he had no interest himself in the judgment, as we have seen, and is now being regarded by us as the representative of the officers). Executions are twice taken out, in quick succession, in her absence, and levied by direction of appellee, the neighbor of appellant in Goodman, with full knowledge of her absence, upon her property. A sale takes place quickly, and the appellee becomes the purchaser of both lots for less than one-twentieth of their value.

To our minds, the rule declared by this court in *Davis* v. *Bell*, 57 Miss., 320, is fairly applicable to the case at bar. Said George, C. J., in that case: "An officer's right to collect his costs by execution is a shield to protect him, not a sword to oppress or destroy the debtor. If he issues an execution, and under it purchases, either directly or indirectly, property of the defendant at a sacrifice, as was done in this case, he must be held to be a trustee for the defendant, unless he shows that he has given notice, by mail or otherwise, to the defendant, if he knows, or could with reasonable diligence ascertain, his residence. He should, in such a case, warn the defendant of the intended issuance of the execution, and of the threatened levy and sale, and thus give him a fair opportunity of preventing a sacrifice of his property.

"The right of an officer to issue or execute process for his own benefit, and to collect costs due him, must be exercised with the utmost good faith, and with a view only of collecting his costs. It cannot be perverted to the gaining of an unfair advantage to the officer in securing property of the defendant at a great bargain."

The condemnation announced by that decision must fall upon the transaction disclosed in the record before us. The appellee attempts to justify his conduct by showing himself

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Statement of the case.

the representative of the officers in the attempt to collect their costs, in the manner and under the circumstances detailed. Put it on that ground, as we do from his own testimony, and the appellant appears to be entitled to the relief sought.

The appellee is entitled to recover such costs as were properly taxable in the execution under which sale was attempted to be made, and which he paid.

Reversed and remanded.

KRIPPENDORF ET AL. *v.* B. WOLF ET AL.

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1. HUSBAND AND WIFE. *Purchase in joint name. Presumption of gift.*

Where a husband buys land, taking the title in his wife's name and his own jointly, and afterwards makes improvements thereon, the presumption is of a gift to her of a half-interest in both the land and improvements.

2. HOMESTEAD. *Husband and wife. Joint property.*

Where a judgment debtor owns jointly with his wife a city lot, he is entitled to a homestead exemption therein of $2,000, to be taken wholly from his half-interest.

FROM the chancery court of Washington county.

HON. W. R. TRIGG, Chancellor.

On March 19, 1888, appellee, B. Wolf, purchased a lot of land in the city of Greenville, Mississippi, paid the purchase-money, and took the title in the name of himself and wife, Anna Wolf. Soon afterwards he built a residence thereon, and otherwise improved the lot, paying therefor with his own means. In January, 1889, he and his wife, with their children, took possession of the property, and have since occupied it as a residence. When the lot was purchased, and the improvements made, Wolf was not indebted to any one. Afterwards he became involved in debt, and, in December, 1890,

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Brief for appellants.

appellants recovered judgments against him. They then filed the bill in this case, against Wolf and wife, seeking to subject to their debts, which amounted to several thousand dollars, the half-interest of said B. Wolf in the lot, and also to make liable the improvements put thereon by him. The defendants answered the bill, denying complainants' right to relief as to the improvements, and setting up in favor of B. Wolf a homestead exemption as to his half-interest in the property.

The court decreed that Anna Wolf was not accountable in respect to the improvements, and that B. Wolf was entitled to have a homestead set apart wholly out of his half-interest, and that complainants were entitled to subject only so much of his half interest as exceeded in value $2,000. Commissioners were appointed, who reported that the property could not be divided, and that the half-interest of said B. Wolf was of the value of $2,750. The decree directed that $750 should be paid into court, to be applied in satisfaction of the debts of complainants, or, in default thereof, that the half-interest should be sold in order to subject the excess over the exemption to complainants' debts.

From this decree complainants appeal.

J. H. Wynn, for appellants.

1. The act of B. Wolf in taking the title of the land in the name of himself and wife was a gift to her of a half-interest therein. But not so as to the improvements. One tenant in common has a right to re-imbursement for improvements made by him. Thompson on Homesteads, 187; 1 Story's Eq. Jur., § 655; 2 Lead. Cas. Eq. (White & Tudor), 916.

There is no proof that Wolf intended to give his wife an interest in the improvements. If any such intent existed, it could have been shown by the parties. It was too late, after the liens of creditors attached, to make such a gift. The essence of a gift or advancement is that it is irrevocable. 4 Am. & Eng. Enc. L., 216.

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Brief for appellees.

2. *Pennington* v. *Seal*, 49 Miss., 518, construed the act of 1865, which gave a homestead only to the head of a family. But under the code of 1871 this was not so. *Partee* v. *Stewart*, 50 Miss., 717. Nor under the code of 1880. See § 1259, which gives the wife the right to claim a homestead. Here the land is owned by both, and if the chancellor is correct, there would be two homesteads.

The only proper mode of allotment is to deduct $2,000 from the common fund, or to allow husband and wife $1,000 each, there being only one residence and one family. The homestead being owned by both with equal privileges, the husband can only claim $1,000 out of the homestead fund.

There cannot be two homesteads in the same property. Thompson on Homesteads, §§ 225, 226, and cases there cited. The very question here was decided in *Willis* v. *Matthews*, 46 Texas, 478, where the homestead was allotted from the common property.

Phelps & Larkin, on the same side.

Campbell & Starling, for appellees.

1. Except in partition proceedings, one tenant in common who improves the common property without consent of the others, is not entitled to compensation. Freeman on Cotenancy, § 262; 2 Am. & Eng. Enc. L., 1104; 17 *Ib.*, 758. The equity of the improving tenant is not a *right* which will inure to the benefit of subsequent creditors.

Whatever the general rule is as to other co-tenants in respect to the right to compensation, a different rule applies as between husband and wife. Where they are co-tenants, and the husband improves the common property, the presumption should be that he intended an advancement. This arises from his duty to provide for the wife. Here it was incumbent on appellants to prove that Wolf, in making the improvements, intended to *charge* his wife.

2. The court properly decreed that the homestead should

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be carved wholly out of the half-interest of B. Wolf, the debtor. All the conditions entitling him to claim the exemption exist. In *Partee* v. *Stewart*, 50 Miss., 721, where it was held that the wife could claim the exemption, stress was laid on the fact that she was "debtor" and "owned" the property.

Primarily, the husband is considered the "householder having a family." Here he was such, and was the debtor owning the property. The fact that the code of 1880 authorizes the wife to claim the homestead exemption as against *her* creditors, does not affect the husband's right as against his creditors in respect to his own property. The wife may own with her husband a home of any value, and her interest can never be made liable by creditors of the husband.

WOODS, J., delivered the opinion of the court.

Both Wolf and his wife answer, under oath, that the half-interest in the lot one, block one, of the Deaton addition, together with the improvements made thereon subsequent to the purchase thereof, was a gift from the husband to the wife. In the absence of all proof, under the circumstances of the case, that would be the reasonable and legal presumption.

The simple question, then, is, shall Wolf's interest in the property, in excess of the maximum value given to the urban householder having a family, alone be subjected to the demands of his creditors? We have no hesitation in answering affirmatively. The fact that Mrs. Wolf has an undivided interest in the property occupied as Wolf's homestead, does not enlarge the rights or remedies of his creditors, nor should it be permitted to endanger her interests. She is to be protected just as any other tenant in common with Wolf would be. The creditors may insist on the liability to their demand of all Wolf's interest in the common property, subject to his homestead exemption right. That is the extent of their right, no matter who may happen to be the tenant in common of their debtor.

Affirmed.

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Statement of the case.

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BOARD OF SUPERVISORS OF RANKIN COUNTY *v.* A. O. WATSON.

PAUPER. *Support outside of poor-house. Duty of supervisors.*

In case of a pauper not in a condition to be removed to the poor-house without cruelty, her condition being made known to the supervisor of the district, who, after long delay, examines into her claims for support, and finds that she is in such condition that she should be cared for where she is, instead of being sent to the poor-house, the board of supervisors should allow to the person who has cared for her proper compensation for her support during the period after notice to the supervisor. *Reynolds* v. *Supervisors*, 59 Miss., 132, distinguished.

FROM the circuit court of Rankin county.

HON. A. G. MAYERS, Judge.

Louisa Ward, an aged and indigent colored woman, lived on the place of appellee, Watson, for a number of years. Some of her children and grandchildren were laborers on the place, and she lived with them, but was fed from the table of appellee. She was never declared a pauper, but in August, 1891, appellee informed the supervisor of the district of her condition, and endeavored to have provision made by the county for her support. She would not consent to be removed to the poor-house, and nothing was then done. The supervisor did not see her until February, 1892, when he informed appellee that he would be allowed $5 a month from that time for her support. She died February 23, 1892, and appellee presented a claim to the board of supervisors amounting to $48, her board from September 1, 1891, to the date of her death. He also asked an allowance of $6 for her burial expenses. The board made the allowance for the burial expenses, but rejected the balance of the claim. On appeal to the circuit court, the case was tried without a jury, and a judgment was rendered in favor of appellee for the additional sum of $30, being six months' board at $5 per month. The county appeals.

The opinion contains a further statement of the case.

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Opinion of the court.

P. Henry and *H. S. Cole*, for appellant.

If the claim of appellee is good, any private citizen may decide who are paupers, and support them at the cost of the county.

In order to have a claim against the county, it devolved on appellee to show that the woman was a pauper, and could not be removed to the poor-house. Code 1880, § 626; *Reynolds* v. *Supervisors*, 59 Miss., 132. She simply refused to go to the poor-house, and was not entitled to support during the time of such refusal. It was an after-thought on the part of appellee to demand pay of the county.

J. L. McCaskill, for appellee.

The board had jurisdiction, and should have allowed the claim, although the person relieved had not been declared a pauper. Code 1880, § 626; *Cotton* v. *Leake County*, 27 Miss., 367.

It was the duty of the supervisor to promptly examine into the claim for support, and send the woman to the poor-house or provide for her support, she not being in a condition to be removed.

CAMPBELL, C. J., delivered the opinion of the court.

The facts of this case distinguish it from *Reynolds* v. *Supervisors*, 59 Miss., 132. The pauper here was not in a condition to be removed to the poor-house without cruelty, and her condition was made known to the proper supervisor, who failed for months to examine into her claims to support, but finally did, and then found her condition worse than he had expected, and such as to make it proper to have her cared for where she was, for which he arranged.

In this state of case, it was proper for the board of supervisors to allow what was right to the person who had cared for the pauper during the period claimed for. The judgment of the circuit court is in accordance with this view, and it is

Affirmed.

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Statement of the case.

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J. W. TAYLOR v. BOARD OF SUPERVISORS OF CHICKASAW COUNTY.

1. MANDAMUS. *Claims against county. Pleading.*

Mandamus lies to compel a county to pay claims allowed by its authorities; and it is sufficient for petitioner to set out unpaid warrants, averring that they are supported by judgments of allowance.

2. STATUTE OF LIMITATIONS. *When not available by county. Warrants.*

There is no statute of limitations to bar proceedings to enforce payment of claims against a county which have been allowed by judgment of its authorities. *Klein* v. *Supervisors*, 54 Miss., 254.

3. SAME. *Staleness no defense because of statute.*

A claim not barred by statute of limitations is good. Because of the existence of the statute, staleness is no defense. *Westbrook* v. *Munger*, 61 Miss., 329.

FROM the circuit court of the first district of Chickasaw county.

HON. LOCK E. HOUSTON, Judge.

Mandamus by appellant to compel defendants, the board of supervisors of Chickasaw county, to levy a tax and provide funds for the payment of certain claims against the county held by petitioner, to wit: one hundred and twelve warrants, drawn on the county treasurer by order of the police court, four by order of the circuit court, two by order of the probate court, and eighty-four jury certificates or warrants issued by the clerk of the circuit court of said county. These warrants, aggregating in amount $3,958.48, were issued at different times from 1848 to 1853. The petition, filed September 24, 1888, alleges that they were duly issued upon the order and judgment of the said courts respectively; that they had been registered by the clerk of the board of supervisors, under the act of March 23, 1886, entitled, "an act to authorize the boards of supervisors to ascertain the outstanding indebtedness of the several counties;" that said warrants were

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Brief for appellee.

unpaid; that the taxes levied for the fiscal year were insufficient to pay the claims, and that the board had refused to make a levy of taxes to pay the same.

Defendants demurred, upon these grounds, chiefly:

1. That the claims were stale.

2. That they were barred by limitation.

3. That suit was improperly brought upon the warrants or certificates, instead of upon the judgments under which they were issued.

4. That it did not appear that they were issued by proper authority.

From a judgment sustaining the demurrer and dismissing the suit, petitioner appealed.

Thomas J. Buchanan, Jr., and *William S. Bates*, for appellant,

Each filed a lengthy brief, as to the questions decided by the court making the following points:

1. This is a proceeding to enforce judgments of the county authorities authorizing the issuance of the warrants, to which no statute of limitation applies. *Carroll* v. *Tishomingo County*, 28 Miss., 38; *Klein* v. *Supervisors*, 54 *Ib.*, 254. A case will not be barred by the statute of limitations, unless it comes clearly within its terms. *Miller* v. *Hinds County*, 68 Miss., 88.

2. As these were existing claims against the county, which had been duly allowed, mandamus was the proper remedy to compel the authorities to levy a tax to pay the same. *Attala County* v. *Grant*, 9 Smed. & M., 77; *Klein* v. *Supervisors*, *supra*.

3. The petition is not subject to demurrer; it states specifically the various warrants, and alleges that they have been duly allowed and registered, and that the board of supervisors refuses to make a levy to pay them.

W. G. Orr, for appellee.

Issuing a writ of mandamus, like an injunction, rests

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Brief for appellee.

largely within the discretion of the judge, and is not required in a case of an old or stale claim. 2 Wall., 87.

It is settled law in the United States supreme court, that every right in equity must be asserted within twenty years. 1 How. (U. S.), 189.

Promptness in the prosecution of claims is required by public policy. *Ib.*, 160.

Stale claims are not favored in this state. *Brooks* v. *Spann*, 63 Miss., 198.

It is not shown that a single statutory or constitutional requirement was complied with in the issuance of these claims. Nor does it appear that they were issued in cases where the county would be liable. The police court and the probate court were courts of inferior jurisdiction, and it is necessary for the record to show affirmatively that every required step was taken. *Stokett* v. *Nicholson*, Walker, 75.

It is the order or judgment of the court, and not a warrant, that confers jurisdiction in a case like this. *Carroll County* v. *Tishomingo County*, 28 Miss., 38; 52 *Ib.*, 42.

If the original claim was not authorized by law, the board could not vitalize it by issuing a warrant. *Supervisors* v. *Arrighi*, 54 Miss., 668; *Honea* v. *Monroe County*, 63 *Ib.*, 171.

Mandamus is an action. Code 1880, § 2542. Being such, it is barred by §§ 2674, 2679.

The board of supervisors is a court, and its judgment is barred by the statute of limitation. *Polk* v. *Supervisors*, 52 Miss., 422.

The case of *Klein* v. *Supervisors*, 54 Miss., 254, is not applicable, because it was decided under the code of 1871, which does not contain a statute like § 2669, code 1880.

The sum of the whole matter is, that appellant's rights of action accrued from 1848 to 1853, and, as this suit was not brought until 1888, he cannot recover. In view of the case of *Miller* v. *Hinds County*, 68 Miss., 88, could there be a more absurd proposition than that these old claims are not

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Opinion of the court.

barred? Section 2736, code 1892, recognizes the justice of the doctrine that such claims should be barred.

COOPER, J., delivered the opinion of the court.

Although the claims sought to be enforced by the petitioner are very old ones, we are unable to perceive any valid reason why they should not now be paid.

It was long ago decided that no statute of limitations applied to judgments of the county authorities allowing claims against the counties, for the reason that the party entitled to payment cannot coerce satisfaction by suing out execution. *Carroll* v. *Tishomingo County*, 28 Miss., 38; *Klein* v. *Supervisors*, 54 Miss., 254.

The allowance of the claims by the county authorities carried with it an obligation to provide funds to pay them, and for failure to discharge this duty they are subject to suit by mandamus. *Attala County* v. *Grant*, 9 Smed. & M., 77; *Carroll* v. *Tishomingo County*, 28 Miss., 38; *Klein* v. *Supervisors*, 54 *Ib.*, 254.

It is true that one proceeding against the county authorities by mandamus must have secured allowance of his claims by proper judgments, but there is nothing in the decision in *Honea* v. *Supervisors*, 63 Miss., 171, that suggests that the warrants may not be stated as the measure of his right by the petitioner, supplemented by proper averments that they are supported by proper judgments, as is done in this petition.

A claim not barred by the statute of limitations is not a stale claim. *Westbrook* v. *Munger*, 61 Miss., 329.

Judgment reversed, demurrer overruled and cause remanded.

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Brief for appellant.

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ACME LUMBER CO. v. FRANCES VANDERGRIFT SHOE CO.

GARNISHMENT. *Void return. Judgment thereon. Code* 1880, § 2443.

Where a writ of garnishment omits to require an answer *in writing*, or to require the garnishee to answer whether he was indebted to defendant *at the time of the summoning of the garnishee, or* since that time, or whether he has *since* had effects of defendant, a return by the officer that he had handed to the garnishee "a true notice of the within," is insufficient, since notice of every thing in the writ would not be a compliance with § 2443, code 1880, which entitles the garnishee to notice in writing of the answer he is required to make. A judgment by default on such return will be reversed.

FROM the circuit court of Lauderdale county.

HON. S. H. TERRAL, Judge.

The appellee, Frances Vandergrift Shoe Company, recovered judgment before a justice of the peace against one Gary. Afterwards plaintiff suggested that the Acme Lumber Company was indebted to the defendant, and a writ of garnishment was issued, the material parts of which, as well as the return thereon, are set out in the opinion. At the return term judgment was rendered against such garnishee. Afterwards the garnishee prayed and obtained a writ of *certiorari*, and the cause was reviewed in the circuit court, the contention being that the return on the writ of garnishment was insufficient to authorize the judgment by default at the return term. But the circuit court sustained a motion to quash the *certiorari*, and from this judgment the garnishee appeals.

It will be seen from the opinion that, while there was a writ of garnishment issued on a judgment, the question of the manner of the service is determinable by a construction of § 2443, code 1880, in the chapter on attachments.

Miller & Baskin, for appellant.

We contend that the judgment rendered against the garnishee at the return term is void. The return does not con-

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form to either of the modes prescribed by the statute. If it were returned merely indorsed "executed," giving the date, and signed by the officer, it would conform to § 1528, code 1880. It is not a compliance with §§ 2442, 2443, for these require notice *in writing* to the garnishee of the answer he is required to make, and the writ does not require answer whether the garnishee *was indebted to the defendant at the time of the summons.* See *Faison* v. *Wolf*, 63 Miss., 31.

McIntosh & Williams, for appellee.

Under §§ 2442, 2443, code 1880, the officer was not required to read the writ to the garnishee or to inform him in writing of the answer he was required to make, unless the garnishee *demanded* it. There was no such demand in this case. Therefore, the only duty on the officer was to inform him of the duty to answer, and when and how to do it. This might be orally or in writing. The return shows that the officer gave the garnishee a true notice of the "within." The "within" was the writ itself, which informed the garnishee what to do, what answer to make, and when and how to make it.

COOPER, J., delivered the opinion of the court.

The return of the officer upon the writ of garnishment was not a valid return. It is that he had delivered to the officers of the garnishee "a true notice of the within."

The return does not show that the officer gave to the garnishee a copy of the writ. The inference is that he attempted to give him notice under § 2443, code 1880. It is upon that theory that counsel for appellee seek to maintain its sufficiency.

We set out the code provisions and so much of the writ of garnishment as are necessary for the consideration of the question involved.

Section 2442 provides how service upon garnishees shall be made. The officer must "inform him that he must appear at

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the court to which the writ of attachment is returnable, there to answer on oath, *in writing*, what he is indebted, *or was indebted, to the defendant in the attachment, at the time of the summoning of such garnishee, or since that time*, or what effects of said defendant he has in his hands, or had at the time of such summons, *or has had since*, and what other persons, to his knowledge or belief, are indebted to said defendant, or have effects of his in their hands."

Section 2443 is as follows: "It shall not be necessary to furnish a garnishee with a copy of the writ of attachment, but he may demand and receive from the officer summoning him a notice, in writing, of the answer he is required to make, as above set forth."

The writ of garnishment in this cause commanded the officer to summon "the Acme Lumber Company to be and appear before said justice of the peace of said county, at his office therein, on the 5th day of October, A.D. 1891, to answer on oath whether they are indebted to said defendant, and in what sum, and what effects of said defendant they have in their hands or possession, or had at the time of the service of this writ, and whether they know of any other person indebted to said defendant, or may have any of the effects of said defendant in his hands or possession."

We have italicised those portions of section 2442 of the code which are absent from the writ of garnishment. It is manifest that they are material, and that notice of all things contained in the writ would not be a compliance with the provision of section 2443 of the code.

The judgment is reversed, and the cause remanded to the circuit court to be further proceeded with.

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Statement of the case.

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DANIEL SULLIVAN v. JACKSON BUILDING AND LOAN ASSOCIATION.

1. USURY. *Building and loan association. Premium for loans.*

A loan by a building and loan association is not rendered usurious by a premium, which the borrowing member agrees to pay for the loan, since such premium is neither a prepayment of interest nor a deduction of money belonging to the member, but merely represents the agreed discount of the future dividends of his shares of stock.

2. SAME. *Usury. Interest on premium.*

But, to the extent that the loan contract stipulates for interest on said premium, it is illegal and essentially usurious. So held, where a member bids off a loan of $1,000 at a premium of 40 per cent., receiving in cash $600, but contracts to pay the whole $1,000, with interest thereon at the rate of 8 per cent. per annum.

3. SAME. *Act of* 1886. *"Money advanced or loaned." Premium.*

The act of 1886 (Laws, p. 35), excepting building and loan associations from the prohibition against taking more than 10 per cent. interest, does not authorize such associations to charge interest on the premiums stipulated to be paid by its members for loans. They are not "money advanced or loaned," within the meaning of said act.

4. ACCOUNTING. *Building and loan association. Diversion of profits.*

A bill by a borrowing member against a building and loan association, for an accounting, alleged that the premiums and profits of the series to which he belonged, and to which, under the charter, at the time of this contract, he was ratably entitled, by a vote of the stockholders, from which borrowing members were excluded, had been diverted from that series and applied to the equal benefit of other and subsequent series, and that this action deferred the maturity of complainant's stock, causing him loss. *Held*, error to sustain a demurrer to the bill.

FROM the chancery court of the first district of Hinds county.

HON. H. C. CONN, Chancellor.

Appeal from a decree sustaining a demurrer to a bill. Appellant, Daniel Sullivan, filed a bill against the Building

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Statement of the case.

and Loan Association of Jackson, Miss., seeking relief because of usury, and also praying for an accounting. The allegations of the bill, briefly stated, are as follows:

The appellee was chartered in 1883 as a building and loan association, the powers conferred upon it being those usually belonging to such associations. The charter provided for the issuance of 2,000 shares of stock of $200 each, and the association was to go into liquidation at the end of ten years, or sooner if the stock reached its par value. Its funds were derived from monthly dues paid by share-holders, interest on loans and fines for non-payment of dues. Loans were made, at stated intervals, to the stockholders who would bid the highest premium therefor, the successful bidder securing the privilege of becoming a borrower upon executing a trust-deed on real estate of the requisite value.

The charter provided for its amendment, by a vote of the stockholders, but borrowing members were excluded from voting. In September, 1885, the complainant, Sullivan, subscribed for five shares of stock in the said company, and, since that time, has regularly paid his monthly dues. In May, 1886, at the monthly auction of funds to be loaned, complainant bid off a loan of $1,000 at a premium of forty per cent., and executed his obligation, promising to pay $1,000, and pledging his stock for its payment, the company stipulating that when the stock became of par value the debt should be liquidated. The contract provided for the payment of eight per cent. interest per annum on the entire $1,000, the interest payable monthly. To secure this loan, complainant and his wife executed a trust-deed conveying to the trustees of the association a house and lot in the city of Jackson, the trust-deed containing the usual provisions for sale in case of default. Thereupon complainant received from the association $600, being the face of the loan less the premium of forty per cent. Complainant has paid the monthly installments due upon his stock subscription, amounting, at the time of the filing of the bill, to $395. He

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has also paid the installments of interest, as agreed, amounting to $472.86, the aggregate of the two amounts so paid being $867.86.

The bill charges that the stipulation in the contract for the payment of eight per cent. interest on the entire $1,000, whereas only $600 was received, is usurious; that the whole arrangement was a device to cover up usury; that, because of this usury, complainant is entitled to receive back from the association all amounts paid by him to it in excess of $600, and to have his note and trust-deed surrendered and canceled.

The bill further alleges that the affairs of the corporation have been illegally and unfairly conducted; that, by a proper application of premiums and the profits and earnings of the association, complainant's stock would have been already liquidated; that, by an amendment of the charter, additional and successive series of stock had been provided for and sold, and loans made and business done under each series; that, under the charter provisions existing at the time complainant subscribed for the stock and executed said contract and trust-deed, all premiums and earnings derived from the series to which complainant belongs should have been appropriated to the equal benefit of the share-holders in that series, but that by a vote of the stockholders of the association, including the stockholders of subsequent series, all of the earnings from all of the series were commingled and applied to the equal benefit of every series; that premiums had gradually grown less, as successive series were created, until loans in the last series, when sold at auction, brought little or no premium; that this application of the profits of the association, by means of a vote of stockholders, from which complainant was excluded, gradually diminished the earnings which should have been applied to the older series, and thus resulted in postponing the maturity of complainant's stock.

The charter of the association and its amendments were made a part of the bill, and from this it appears that it was originally contemplated that there should be only one series

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Brief for appellant.

of stock, but that in May, 1886, after the making of the loan to complainant, the corporation procured an amendment of its charter, which provided for the issuance of successive series of stock to new stockholders, not oftener than once in six months, and that the funds and business of each class should be kept separate, and loaned only to members thereof, and that no stockholders in any class should have rights in another class, and that each class should be wound up separately; that subsequently, in January, 1887, the association again amended its charter by striking out the above-mentioned provision intended to limit stockholders to the profits of the class to which they belonged, and that thus the members of the first and older series would lose the benefits that should accrue to them because of the higher premiums which then prevailed. The bill prayed, in addition to the surrender and cancellation of complainant's trust-deed, that an accounting be had of all payments made by him on any account, and for a personal decree for any balance found to be due him, over and above the $600 received by him.

Defendant demurred, upon the ground that there was no equity on the face of the bill; that the transaction with complainant is not usurious; that the complainant, as a member of the association, acquiesced in the management of its affairs, and has shared in the profits of transactions in all respects similar to this, and is estopped; and, finally, that defendant does not offer to do equity.

The act of March 13, 1886, provided that thereafter no person or corporation, except building and loan associations, should contract for more than ten per cent. interest "for any money advanced or loaned, or any note, account or other evidence of debt."

E. E. Baldwin, for appellant.

1. The stipulation for interest on the premium rendered the contract usurious. 45 Md., 546; 58 *Ib.*, 569; 25 Ohio St., 208; 31 *Ib.*, 517; 55 Iowa, 424; 48 *Ib.*, 385; 12 Bush.

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(Ky.), 110; 2 Cold. (Tenn.), 418; 12 Rich. Eq. Rep., 124; Endlich on B. & L. Associations, § 398. Courts which hold a contrary doctrine do so under special statutes.

2. The act of 1886 has no application. It had reference to those special acts or charters conferring on banks or other corporations the right to take more than legal interest, and repealed such acts except as to building and loan associations. But § 1141, code 1880, prohibiting usury, remained unrepealed. The charter of appellee was in existence when the act of 1886 was passed, and if it contained any provision to warrant the taking of usury, it was repealed by the second section of the act of 1886.

3. The bill clearly makes out a case for an accounting.

Nugent & Mc Willie, for appellee.

1. The transaction complained of is not usurious. It did not really involve a loan, but a dealing in what may be termed the partnership fund, in view of the joint interest of all the members of the association. Besides, there was in it an element of uncertainty and risk that relieved it of the objection of usury, as in the case of bottomry bonds. 6 Bing. N. C. (Eng.), 180; 6 Allen, 1; 78 Tenn., 677; 19 S. W. Rep. (Ark.), 917; 1 N. Y. Ct. of App., 347; 22 Kan., 624; 26 N. J. Eq., 351; 43 N. H., 194; 46 Ga., 166; 69 Am. Dec., 161, note; Tyler on Usury, 98.

2. The act of 1886 took building and loan associations out of the operation of the laws against usury. The prevalent public policy was manifested at that time, and it has been recognized in the recent revision of our laws. The title of the act stamps it as part of our general law on the subject of usury. The construction of the act contended for by appellant would make it unconstitutional as seeking to repeal charter rights. Such an interpretation is to be avoided. 2 Morawetz on Priv. Corp., §§ 1050, 1056; Sutherland on Stat. Con., § 336. The act is in reality a rude re-enactment of § 1141, code 1880, with a proviso in favor of building and loan associations.

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Opinion of the court.

3. Appellant's interpretation of the amendments to the charter is erroneous. It will be seen that the provision requiring the funds and business of each series to be kept separate is still in force. It is not alleged that they have been actually mingled, but that the *effect* of the amendments is to mingle them. As all the members of the first series who wished to borrow had done so, it became necessary to issue new series of stock, in order to increase the number of borrowers and consequent profit, and carry out the primary object of the corporation in enabling all who then were, or might become, members to procure homes. That appellant was excluded from voting on the amendments is no cause of complaint. They were adopted strictly in accordance with the charter, and by members of the same series with complainant. His being debtor to the association gave him no greater rights than non-borrowing members had. Besides, an accounting in respect to particular shares of stock is "a practical impossibility." Endlich, § 129. Complainant does not pray for liquidation of the first series, but only for an accounting as to his own shares. Others have rights, and are equally entitled to whatever of profit there may have been in his particular transaction, and he must continue to pay his dues until maturity of his stock, or he will lose that profit.

Argued orally by *E. E. Baldwin* for appellant, and *T. A. McWillie* for appellee.

WOODS, J., delivered the opinion of the court.

The questions involved have been so often and so exhaustively considered by courts of last resort that it appears like beating threshed straw to do more than announce the views of this court.

1. The premium of $400 represents the discount agreed to be made upon the future and uncertain dividends of appellant's shares of stock in the association. It is the difference,

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estimated by the association and its borrowing member, between the par value of the member's shares of stock and their present real value. It is the bonus which appellant might lawfully agree to pay for a present advancement in cash of a sum certain for the virtual transfer to the association of his shares of stock, which, in the final winding up of its affairs, may realize the sum actually received by the member, together with the premium bid, or which may not. It is not a deduction of money belonging to him, for, at the time of the transaction, appellant had only a future interest in the association's earnings and accumulations. It is not a prepayment of that amount by appellant, for the premium of $400 will be paid, if at all, when the $600 advanced is repaid.

We are of opinion, therefore, that the premium does not render the contract usurious.

2. It logically and legally follows that interest cannot be charged on the premium. "If it were a deduction, it would be analogous to the bonus reserved in advance by usurers upon loans made by them, ostensibly at legal interest, the debtor being, nevertheless, required to pay that interest upon the whole nominal sum, as if he had received it entire, thus virtually paying interest upon the bonus. If it were intended to be a prepayment, the borrower, since he in fact does not hand it over immediately, ought to pay interest upon it to the society, as for the forbearance of a debt presently due." Endlich's Law of Building Associations, 396. From the nature of the premium—being neither a deduction nor a prepayment, but only, in effect, a relinquishment of a prospective, contingent interest in appellant's shares of stock—it is impossible to conceive of interest predicable thereon, unless wild legislation shall be found to authorize it. It is startling to the judicial mind to be forced to consider a proposition which involves the assertion of a right to take interest upon a purely imaginary sum. Interest, to the legal and common mind alike, means compensation for the loan or use of money,

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and to talk of interest upon the appellant's premium of $400, a sum which is mythical, which he never saw, which was not in existence, and which, if it ever came into being, was to be the property of the association, is paradoxical indeed. The contract, to this extent, is oppressive, illegal and essentially usurious. And to this effect is the almost unbroken current of authority. In the one or two exceptional cases, unwise legislation constrained the action of the court.

And this brings us, in an orderly way, to the contention of appellee's counsel that such legislation is found in the acts of our legislature, 1886, p. 35. We cannot agree with the learned counsel. The utmost that this remarkable act can be said to do is to authorize building and loan associations to stipulate for and demand a greater rate of interest than ten per cent. per annum "for any money advanced or loaned" by it. Legislative tenderness for such corporations has not yet gone, as counsel suppose, to the violent extreme of permitting even these favored associations to stipulate for and demand any extortionate rate of interest which its greed and its borrowing member's necessity might fasten upon the unhappy and necessitous creature, on any imaginary sum of mythical money which they agreed to name, even though such sum was never seen by the member, and even though such sum had no existence, in fact, at the time of the transaction. For the present, the borrowing member can only be constrained to pay extortionate and usurious interest upon "*money advanced or loaned*"—money which he actually received and had, and not upon forty per cent. of all his shares of stock in the association, which he has virtually transferred to the association, under the name and in the form of a premium.

3. The averments of the bill, substantially stated, as to the illegal abrogation of the charter provisions in force when appellant became a member, and when he had the transaction out of which this litigation arose, as to the use and disposition of all funds arising out of the business of the first series,

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Suggestion of error.

and the consequent injury to appellant, are as follows: that the association, by a vote of the stockholders, from which all borrowing members were excluded, broke down all distinctions between the first and all other and junior series, and mingled the business of all in one common mass, whereby all stockholders in any series were made sharers equally of all profits arising in all the various series; that the premiums at first were high, and gradually decreased from forty per cent. to nothing; that the $400 premium bid by appellant represents that much accumulated profits, in which appellant has an interest, and this, by the action of the association, had through persons who were not members of the first series (the share-holders in the many subsequent series largely outnumbering those in the oldest, the first, of which appellant was a member), has been divided out among all the stockholders in all the various series, thus taking from appellant profits, which, if properly applied, and as should have been done, to his stock, would bring it up to par, and would put the association into liquidation, and would cancel his debt.

These averments are of material matters entitling the appellant to relief, if true, and the demurrer admits their truth. The defendant corporation, against which these serious charges are made under oath, should have been required to answer.

Reversed and remanded.

Nugent & Mc Willie, for appellee, filed a lengthy suggestion of error, reviewing in argument the entire subject-matter of controversy, and, in support of the contention that the premium, and taking of interest thereon, do not make the contract usurious, citing the following authorities, in addition to those cited in the brief: *Montgomery* v. *Robinson*, 69 Ala., 419; *Ib.*, 456; 20 S. W. Rep. (Texas), 116; *Ib.*, 118.

Under the act of 1886, the sum received is no more a loan than is the premium. The words, "money advanced or loaned," should not be held to have the restricted meaning

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Response to the suggestion of error.

applied to them in the opinion. The manifest intention of the act was to except building and loan associations from the usury laws.

WOODS, J., delivered the following response to the suggestion of error:

The very respectful, yet very determined, earnestness with which the learned counsel for appellant press their suggestion of error seems to call for a word by way of response.

The argument of counsel is the strenuous effort of acute intellect and dialectical skill to make that which appellant, in effect, parted with and surrendered up to the company—to wit, the premium of $400 in his shares of stock—appear to be not a loan perhaps, but a something which he is due the association, and for forbearance to collect which he should be required to pay, not interest at eight per cent. per annum perhaps, but something which will perform the beneficent purpose of securing eight per cent. to the association from the appellant. Careful examination of the argument demonstrates its unsoundness. It is the argument once considered by us presented under new and alluring aspects, but it is, after all, but the winning and seductive effort to gain the beguiled assent of the judgment to the taking of interest on a sum never advanced or loaned, a purely imaginary but precious fancy of the usury-taker—a sum called a premium, which the borrower has virtually surrendered, and the association accepted; a sum which the borrower is never to see again, but which the association really has the only beneficial interest in, and which, if there be no miscarriage, the association will finally put bodily in its coffers. The premium is now, in truth as well as in effect, the property of the association, and has been parted with forever by the borrower, and we are slow to listen to any voice, though "charming never so wisely," which seeks to fasten any thing in the shape or nature of interest thereon upon the borrowing member.

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Response to the suggestion of error.

We have thoroughly considered the authorities submitted by counsel, and find they give their theory no support.

The very recent case from the supreme court of Illinois, *Mutual Building and Loan Association* v. *James B. Tascott*, does not touch the question. True, it is allowed that interest upon the premium was permissible and proper, but an examination of Starrs & Curtis' Annotated Statutes of Illinois discloses the fact that the charge of interest upon the premium is expressly warranted by legislative enactment. See page 78 of said work.

The case of *Montgomery, etc., Association* v. *Robinson*, 69 Ala., 419, asserts the doctrine contended for by counsel, but an examination of the acts of the Alabama legislature, 1866–67, p. 414, discloses legislative authority given the association to collect interest upon the premium.

The case of the *International Building and Loan Association* v. *Abbott et al.*, supreme court of Texas, not yet reported officially, but which counsel furnish us from advance sheets, is authority for the doctrine that when the whole amount of interest charged the borrower, on every account, sum actually advanced and premium, does not exceed the maximum rate of interest in that state, the contract will not be usurious. We express no opinion as to the soundness of this view; but, sound or unsound, that is not the question involved in the case before us. Besides, in *Jackson* v. *Cassidy*, 68 Texas, 282, the supreme court of that state, when the question of allowing interest upon a premium was squarely presented, emphatically repudiates such interest charge as usurious. Says Willie, C. J.: "The weight of authority holds it unlawful to charge interest upon the premium; for this is a charge, not upon what the member receives, but upon what he relinquishes to the society."

The two Arkansas cases, *Reeve* v. *Ladies' Building Association* and *Taylor* v. *Van Buren Building and Loan Association*, do not determine the point in controversy; they do not even allude to it. They have no sort of relevancy to the

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controversy in hand. In one, it was held that there can be no usury in a building association mortgage which expressly stipulates that the borrower shall not pay more than the legal rate of interest; and in the other, there is a repetition of the early learning touching the nature and character of the loans and contracts of building and loan associations, beginning with *Delano* v. *Wild*, 6 Allen, and *Bowker* v. *Association*, 7 Allen, and coming down to Endlich's work on the subject. But there is no syllable of support for the contention of the counsel for appellant.

The case of the *Vermont Loan and Trust Company* v. *Whithead*, supreme court of North Dakota, not yet reported, is a voluminous gathering up and rehearsal of law learning on building and loan associations, beginning with the English case of *Selver* v. *Barnes*, 6 Bing. N. C., 180, the earliest authority with which we have met. But, interesting as the learning might prove to one unread in it, the novice would fail to find in the Dakota case any support for the counsel's position, for the reason that, by statute of that state, interest on premiums is allowed to be charged.

The case of *Citizens' Mutual Loan Association* v. *Webster*, 25 Barb., 263, justifies the taking of interest upon a premium, but upon a judicial interpretation of a statute of New York, which the court said must be held to allow the collection of interest upon the full amount of the share—that is, upon the sum actually loaned or advanced, and upon the premium.

These are the cases cited and relied upon by the learned counsel. The supposed support derivable from them for counsel's contention vanishes at the touch of investigation.

We thought it unnecessary to quote authorities in delivering the former opinion of this court. The field of inquiry had been so thoroughly explored, and the general subject so often and so exhaustively considered, that we declined to beat again the threshed straw.

See Endlich on Law of Building Associations; Am. & Eng. Enc. of Law, same subject; Thompson on Building Associa-

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tions. See, too, the many adjudications of courts of the last resort, cited in the three text-books named, holding interest upon premiums is inadmissible.

We have no doubt as to the absolute correctness of the former opinion of the court, and we adhere to it.

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STATE REVENUE AGENT v. C. J. HILL ET AL.

1. REPEAL OF STATUTE. *Laws* 1890, *p.* 25. *Code* 1892, *ch.* 126. *Revenue agent.*

The act of 1890 (Laws, p. 25), providing for the collection of delinquent revenue by the state revenue agent, was repealed by the adoption of chapter 126, code 1892, relating to the same general subject.

2. REVENUE AGENT. *Suit by, abated. Repealed statute. Code* 1892, *ch.* 126.

Said chapter 126, code 1892, does not authorize the state revenue agent to sue an assessor for taxes lost because of his failure to assess the same, and a pending suit, brought by him under the act of 1890, to recover taxes so lost, was abated April 2, 1892, upon the adoption of the code chapter which repealed said act.

3. SAME. *Code* 1892, § 4; *effect of. Suit under repealed statute.*

Such pending suit was not saved by § 4, code 1892, declaring that the repeal of any statute by the code provisions should not affect any suit commenced, etc., because this section, though adopted as a part of the code April 2, did not take effect until November 1, 1892.

4. CONSTITUTIONAL LAW. *Legislative power. Creating additional offices.*

The legislature may create offices or agencies not specifically provided for in the constitution, subject to the limitation that there must be no invasion of the plan of the fundamental law, and nothing done inconsistent with the unobstructed operation of any of its provisions.

5. SAME. *State revenue agent; his powers.*

Accordingly, while the constitution provides for various state and county officers, and makes no mention of state revenue agent, it is competent for the legislature to provide for the selection of such officer, and to arm him with the power to bring any action which the state or any of its political subdivisions could bring,

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Brief for appellant.

6. CODE 1892. *Validity. Adoption. Chapter* 126. *State revenue agent.*

Chapter 126, code 1892, relative to state revenue agent, was lawfully adopted as part of the code. *Hunt* v. *Wright, post.*

FROM the circuit court of Warren county.

HON. J. D. GILLAND, Judge.

This action was instituted December 21, 1891, by Wirt Adams, state revenue agent, under the act of February 22, 1890, against Carter J. Hill, late assessor of Warren county, and the sureties on his official bond, to recover certain taxes which, it is claimed, were lost to the state and to Warren county, by reason of his failure to assess the Vicksburg Bank and the Mississippi Home Insurance Company during the years 1888 and 1889, as required by § 498, code 1880.

Section 557, code 1880, referred to in the opinion of the court, is as follows:

"The assessor and collector, with their sureties, shall be severally held liable, and bound to pay on their bonds, to the county or state, the full amount of all sums lost to the state or county, respectively, from the failure or neglect of such assessor to assess, return or otherwise faithfully to complete his assessment, or from any neglect of the collector to collect the taxes assessed."

From a judgment sustaining the demurrer of defendants and dismissing the suit, this appeal is prosecuted.

The opinion contains a further statement of the case.

Calhoon & Green, for appellant.

1. The language of the act of 1890 is broad enough to include this action, which was brought after the decision of this court in *State* v. *Vicksburg Bank*, 69 Miss., 99, wherein it was decided that the remedy in a case like this is against the assessor's bond.

2. The serious question is whether chapter 126, code 1892, repealed the act of 1890 so far as it gave the revenue agent the right to recover from assessors under § 557, code 1880; and, if so, whether a pending action was abated thereby.

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Brief for appellees.

Said chapter 126 gives the right to sue for "revenue improperly withheld." Section 557, code 1880, creates a liability against the assessor for taxes lost through his neglect. The assessor is made liable in place of the tax-payer, who escapes. This is revenue due the state. Upon the principle that it is a present, fixed liability without assessment, the court, in the case above cited, held the action maintainable.

3. But if the act of 1890 was repealed by the adoption of the code chapter, it did not abate this suit, which was duly commenced under said act of 1890. The suit is saved by the express provisions of § 4, code 1892.

Martin Marshall, for appellees.

1. Under the act of 1890, the authority of the state revenue agent to sue extended to only three classes of cases: (1) where the officer charged with the duty of collecting had collected and failed to pay over; (2) where he had obtained improper credits in settlements of his accounts; (3) where there is public revenue due under any law of this state, which is delinquent. It did not include this case.

2. The right to maintain the suit was not given by chapter 126, code 1892, if it be in force, because, in the first place, it was adopted after the suit was instituted, and in the next place the chapter does not specifically authorize a suit of this kind. Statutes granting powers are to be strictly construed. Sutherland on Stat. Con., § 392. Statutory remedy or proceeding is confined to the very case provided for, and extends to no other. *Ib.*, 392, 393.

3. Said chapter 126, code 1892, repeals the act of 1890 by implication. Sutherland on Stat. Con., § 187 *et seq.* It makes no provision for pending suits.

4. It seems that this suit was brought upon the dictum of this court in *State* v. *Vicksburg Bank*, 69 Miss., 99. It was not intended by the language there used to declare that the *revenue agent* could maintain the suit on the officer's bond under § 557, code 1880. This case is an illustration, however,

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Brief for appellees.

of the "tendency of such dicta to uphold a doctrine or point, which, perhaps, on examination, cannot be sustained, while the support which the doctrine derives from the dictum is sufficiently powerful to invite litigation."

Dabney & McCabe, on the same side.

1. The legislation creating the office of state revenue agent is unconstitutional. The constitution of 1890 provides for various state and county officers, prescribes their qualifications, and fixes the term of office of each. The law providing for the appointment of the revenue agent was in force when the constitution was adopted, yet that instrument nowhere mentions such an officer. There was an implied silent abolition of the office and officer, and the duties he had performed were parceled out among designated constitutional officers.

2. An inspection of the act of 1890, under which this suit was brought, will show that the suit was unauthorized. By a curious oversight the revenue agent was not authorized to sue the assessor. The language used by this court in *State* v. *Vicksburg Bank*, 69 Miss., 99, will not support the position that the revenue agent may bring suit against the assessor under § 557, code 1880. That section provides for suit, but it must be brought by the person expressly authorized. *French* v. *State*, 53 Miss., 651.

3. If the act of 1890 authorized this suit, it was repealed by the adoption of chapter 126, code 1892, approved April 2, 1892. As the suit was brought December 21, 1891, under the act of 1890, it went with the repeal of that act.

Section 4, code 1892, which provides for the maintenance of pending suits in cases of repeal by the adoption of the code, does not save this suit, for that section was not to go into effect until November 1, 1892. The suit was left without authority on the adoption of the code chapter, April 2, 1892.

4. We are informed that the act relating to state revenue

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agent, chapter 126, code 1892, was passed within five days next before the close of the legislative session, in violation of § 68 of the constitution, and without a three-fifths vote of the members of each house, required by § 70. This being so, it failed to become a law. We make this point with some diffidence, however, as we have not a copy of the journals.

CAMPBELL, C. J., delivered the opinion of the court.

This action was brought under the act of 1890, creating the office of state revenue agent, before it was superseded and repealed by the act of April 2, 1892, on the same subject. There is no question of the right of the state, or any county, to maintain an action by virtue of § 557 of the code of 1880, but the question is as to the right of the revenue agent to do it, and its solution depends on whether it is conferred by law. Undoubtedly the act of 1890 was repealed by the code chapter taking its place on April 2, 1892, and the fourth section of the code of 1892, invoked by counsel for the appellant to save pending suits from abatement by the repeal of the law sustaining them, did not take effect until November 1, 1892. The blunder was committed of causing a number of acts, constituting parts of the code, to take effect immediately, without any saving clause, except one to become operative on November 1, 1892, after the mischief was done in some instances; but, while no saving clause was adopted as to these acts, where the old law was re-enacted by the new, actions pending by virtue of the old did not fall, because the law, being continued as before, there was no instant when it was not in force, and no gap into which the suits previously begun would fall. *Anding* v. *Levy*, 57 Miss., 51.

Therefore, if this action was maintainable by virtue of the act of 1890, and the same right is continued by the act of April 2, 1892, constituting chapter 126 of the code of 1892, the action did not fall merely by the transition from one law to another.

The act of 1890 (Laws, p. 25) has been the subject of re-

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peated examinations by us, and every word in it has been *pondered* to ascertain the import of all it contains, and we have no hesitation to declare that no other interpretation can be made of sections 2 and 3 of the act (and these alone, if any, contain the right), excluding the last clause of section 3, except that the power conferred has reference to fiscal officers engaged in *collecting* revenues. The last clause of section 3 is general: "*Where there is public* revenue of any kind whatsoever, due under any law of this state, which is delinquent, and which, for any reason, has escaped collection." It is difficult to conceive of revenue being *delinquent*, for *delinquency* is predicable of persons only, and not of things, which cannot commit an offense; but this is merely verbal criticism, and the question is whether a liability under § 557 of the code of 1880 can be said to be *revenue due* under any law, and which has escaped collection, and of this there are certainly serious doubts, generated by the language employed and its connection.

Even if the action could be maintained under the former act, as it was repealed by the code chapter, the question arises as to a continuation of the law giving the action by embracing it in the new act. We have examined that with great care, and with anxiety to maintain the right of the revenue agent to sue in this class of cases, but have searched in vain for the grant of power to sue for a liability to the state or county for a specific failure of duty, as provided for by § 557, code of 1880, and § 3849, code of 1892, in both of which specific provision is made for suit being caused to be instituted by any tax-payer who will become responsible for the costs of suit. Very large powers are conferred by chapter 126, but it contains no provision from which can be fairly deduced the grant of power to maintain this particular class of actions. The act shows a studied effort to confer very extensive powers on the agent, but a clear omission to embrace this particular, and, as we think, very proper one. Therefore, if it were conceded that this action was maintain-

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able under the act of 1890, it fell with the adoption of the code chapter, which does not contain any provision for such an action.

But it is urged by counsel for the appellees that the code chapter was not adopted in the mode prescribed by the constitution, and that it is not law. If this were true, it would not benefit the appellees, as must appear from what has been said, for there is more ground for the claim that the act of 1890 confers the right of action in this case, than that the code chapter does, and, if the code chapter was not made law, the act of 1890 remained in force. But this objection is met and disposed of by the opinion of this court in *Hunt* v. *Wright*, *post*.

A vigorous assault is made by the counsel for the appellees on the act creating the office of "state revenue agent," and it is argued that the whole legislation on this subject is unconstitutional, as introducing an officer unknown to the constitution, and contrary to it, because all officers deemed necessary by the framers of that instrument were provided for in it, and this officer was not thus provided for.

We agree that the legislature may not invade or disregard the constitutional scheme for assessing and collecting taxes. It cannot substitute any other for those provided by the constitution for assessing and collecting. It cannot set aside or dispense with the officials provided by that instrument for these duties. It cannot create a right of action in order to confer it by reason of past transactions. There are many things it cannot do, which need not be specified now. But we do not agree to the proposition that the legislature may not create offices or agencies not provided for specifically by the constitution, the limitation being that there must not be any invasion of the plan of the fundamental law or any thing inconsistent with its provisions and their unobstructed operation. The power to create other offices than those provided for by the constitution, subject to the limitation mentioned, results from the grant to the legislature of legislative power.

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Statement of the case.

We are, therefore, of the opinion that the legislature had the right to create a state revenue agent, and to arm him with the power to bring any action which the state or any of its political subdivisions could bring. Further than this we are not now called on to go.

It follows that, as the act of 1890 was repealed by that of 1892, and it does not contain a grant of power to sue for the liability claimed in this action, the action abated upon the adoption of the new law, whether it was sustained by the former law or not.

Affirmed.

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F. W. WILLIAMS v. S. J. SIMPSON.

UNLAWFUL DETAINER. *Defense. Failure to pay privilege tax. Code* 1880, § 589.

Where plaintiff, in an action of unlawful detainer, claims by virtue of a sale under a trust-deed, defendant can defeat a recovery by showing that he gave plaintiff the trust-deed to secure a debt contracted with him while he was conducting business as a merchant without having paid a sufficient privilege tax, whereby, under § 589, code 1880, the contract was void; and the defendant in such case need not pay or tender the amount due, as he would be required to do on seeking affirmative relief in equity.

FROM the circuit court of Bolivar county.

HON. R. W. WILLIAMSON, Judge.

Action of unlawful detainer by Simpson against Williams for the possession of certain land in Bolivar county, Mississippi. Simpson was a merchant at Duncan, in said county, and, as such, furnished Williams money and merchandise during the years 1888 and 1889. On February 17, 1889, he owed Simpson a balance on account of the dealings for the former year, and gave a trust-deed on the land in controversy to secure this, together with certain advances to be made during the year 1890. As a part of the amount for which

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Brief for appellant.

the land in controversy was sold under the trust-deed, there was a note of Williams' to the Louisville, New Orleans and Texas Railway Company, being for the purchase-money of the land, advanced by Simpson, and also an indebtedness due by Williams for a lot of cotton. There being a balance due of the secured debt, the land was sold under the trust-deed April 6, 1891, and was bought in by Simpson, who received a deed from the trustee, and brought this suit to recover possession. Judgment was rendered in his favor, and the defendant appealed to the circuit court, where plaintiff again prevailed, and the defendant appealed to this court.

In the court below, the defendant, among other things, defended upon the ground that the plaintiff had not paid a sufficient privilege tax as a merchant during the years 1888, 1889 and 1890. On objection, the evidence offered by defendant as to this was excluded.

It was shown that the defendant was present at the trustee's sale, and made no objection thereto.

The opinion contains a further statement of the case.

Section 585, code 1880, levies a privilege tax on merchants and others, and § 589 provides that "all contracts made with any person who shall violate this act in reference to the business carried on in disregard of this law, shall be null and void, so far only as such person may base any claim upon them, and no suit shall be maintainable in favor of such person on any such contract."

Butt & Butt, for appellant.

The court erred in its ruling as to the privilege tax. By the express terms of the statute, all contracts in reference to the business carried on in disregard of it are void, and no suit can be maintained thereon. Code 1880, § 589. The trust-deed being void, the sale under it conveyed no title. *Bowdre* v. *Carter*, 64 Miss., 221; *Pollard* v. *Insurance Co.*, 63 *Ib.*, 244. See also *Parchman* v. *McKinney*, 12 Smed. & M., 631. This case is unlike *Dean* v. *Robertson*, 64 Miss., 195, and *Ham-*

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ilton v. *Halpin*, 68 *Ib.* In each of those cases the debtor was the actor seeking relief. Here the attitude of the parties is reversed. As the creditor bought, he cannot occupy the position of an innocent purchaser.

J. W. & W. D. Cutrer, for appellee.

1. Appellant having stood by and suffered the property sold without protest, is estopped to deny the validity of the sale.

2. The defense as to the privilege tax cannot be interposed to defeat a claim, unless the party invoking the statute shall have offered to pay what is justly due. *Hamilton* v. *Halpin*, 68 Miss., 99.

Further, this is not an effort on the part of appellee to maintain a suit on the contract. The matter has passed that stage. Appellant cannot set up the defense in this possessory proceeding. He could have enjoined the sale, on condition of tendering the true amount due. Having failed to do that, his only remedy is by bill to vacate the conveyance, and restore the status existing before the sale. And relief would not be granted in such case without payment of the amount due. If this is not true, a debtor suffering his property to be sold without protest, would occupy a better position than one resorting to equity in the first instance.

3. Besides all this, the action of unlawful detainer is not one to try title. An investigation of the questions raised on this statute would be a direct trial of title between the parties.

WOODS, J., delivered the opinion of the court.

The precise question is, may a defendant in an action of forcible entry and unlawful detainer show—

1. That the conveyance through which the plaintiff seeks to show his right to possession is made by a trustee in a trust-deed executed by the defendant theretofore, to secure a debt due by defendant to plaintiff, and contracted in the course of dealings between them as merchant and customer.

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2. That at the time the debt, so secured by said trust-deed, was contracted, the plaintiff was a merchant who had failed to pay his privilege tax as such.

3. That at the trustee's sale, in an effort to secure payment of the debt, the delinquent merchant was the purchaser.

4. That under a deed made pursuant to such sale, the plaintiff seeks to show title to the premises, in order to demonstrate his right to maintain this action under our statutes.

We answer that the defendant may protect himself in this action by showing that the debt was not collectible by law; that the trust-deed was void, and that the conveyance from the trustee was likewise void. The debtor had a right to stand upon the absolute invalidity of the contract made with the merchant who was delinquent in paying his privilege tax. He could stand, and, in any contest between such merchant and himself by which the merchant sought to possess himself of the fruits of his void contract, he could show that the title of his adversary was a nullity.

This suit was but a step in the proceedings necessary to maintain a contract declared by statute to be null and void. In this further assertion of his supposed rights under the void contract, the delinquent privilege tax-payer is only seeking to reap the benefits which he attempted to secure to himself by such contract, and his debtor may meet his attack at any point, in any forum. He might have exhibited his bill in chancery to enjoin the sale under the void trust-deed, but he was not compelled to do so. He may stand on his possession of the property attempted to be conveyed by the void deed, and there resist the attack of his adversary. If he had gone into a court of equity, as suggested by appellee's counsel, he would have been required to do equity by paying what he really owed; but that would have been attributable to the peculiar rules for the administration of law in that forum. He chose not to subject himself to the imposition of that burden, and the creditor has seen fit to make his assertion of

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Statement of the case.

his rights under his contract in a court of law, and must abide the consequences.

The result necessarily flowing from any other view would virtually abrogate the statute. If the debtor of the merchant delinquent for privilege tax should be required to resort to equity for his defense, no merchant need ever again pay the tax which the law designed, by severest penalties, to constrain him to pay at the proper time. If the debtor could only have relief by an appeal to a court of equity, in which he would be required to pay the debt before having relief granted, the merchant would have an open door through which to escape the plain requirements of this stringent law.

Reversed and remanded.

BOARD OF SUPERVISORS OF OKTIBBEHA COUNTY *v.* A. P. COTTRELL.

REWARD. *Arrest. Fleeing. Code* 1880, § 3035.

Where one who has killed another is arrested in open day, on a highway, while going into the town of his residence, being near the business part of it, he declaring at the time that he is on the way to surrender, the arrest is not made while he is "fleeing, or attempting to flee," within the meaning of § 3035, code 1880, and no reward can be allowed therefor.

FROM the circuit court of Oktibbeha county.

HON. LOCK E. HOUSTON, Judge.

One Humphries killed O'Hare in Oktibbeha county, about four miles from West Point, in Clay county. About three hours after the killing, Cottrell, a private citizen, arrested Humphries within the corporate limits of West Point, but not in the business part of the town. Cottrell and Humphries both resided in West Point. Humphries was a railroad section-foreman. He went from the scene of the killing to West Point on a hand-car, which he left near the depot in charge of some hands. Appellee, hearing of the homicide,

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Brief for appellee.

went to arrest Humphries. The laborers in charge of the hand-car refused to tell him where Humphries was, when appellee started to go to a place west of town, where he expected to find him. Having proceeded about one or two hundred yards, he met Humphries and arrested him. Humphries submitted without resistance, and gave up his pistol. He stated at the time that he thought he would go out home and change his clothing, and then come back and give himself up. He had the reputation of being a desperate and dangerous man. The marshal of West Point had also heard of the homicide, and was looking for Humphries to arrest him when Cottrell made the arrest. Between the scene of the killing and West Point there is a wide swamp, which at that time was covered with water, and could only be crossed by following the railroad.

Cottrell presented his claim to the circuit court for the statutory reward of $100. Over the disapproval of the district attorney, the court allowed the claim, which was certified to the board of supervisors for payment. The board rejected the claim, when an appeal was taken to the circuit court, and a judgment was there rendered against the county, from which this appeal is taken.

W. B. Walker, for appellant.

Humphries was not "fleeing, or attempting to flee," at the time of the arrest. He was on one of the public streets in West Point, going to the officers to surrender. Under these circumstances, the statutory reward was not recoverable.

Beall, Carroll & Pope, for appellee.

If the record does not show a case within the provisions of § 3035, code 1880, we scarcely know what facts would entitle one making an arrest to the reward. The slayer had fled to another county, where he was arrested. He was known to be a desperate man. This fact, together with the small statutory reward, constituted the inducement to make the arrest.

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The object of the statute manifestly is to encourage private persons to be active in making arrests in such cases. It had such effect in this case. Appellee took all the risk attending the arrest of a most desperate man, and he is entitled to the reward.

COOPER, J., delivered the opinion of the court.

The evidence does not support the finding of the court below that Humphries was "fleeing or attempting to flee" at the time of his arrest. On the contrary, it very clearly appears that he was not, but was, in open day, upon a most public highway, going to the town in which he lived, and, if he had not been arrested where he was, would, within a few minutes, have reached the business part of the town; and that, when arrested, he stated that he was on his way to surrender to the proper authorities. Under these circumstances, no allowance can be made to the arresting person.

The judgment is reversed, and the petition of appellee dismissed.

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MISSISSIPPI HOME INSURANCE CO. v. LOUISVILLE, NEW ORLEANS & TEXAS RAILWAY CO.

1. RAILROADS. *Fires. Contributory negligence. Master and servant.*

In an action against a railway company to recover the value of a mill destroyed by fire, alleged to have been negligently set out by a locomotive, where it is shown that the employes of the mill were charged with the duty of extinguishing fires, it is not error to instruct that if, after discovering the fire, they could have extinguished it, but failed to use ordinary diligence in doing so, the plaintiff cannot recover.

2. SAME. *Adjacent property. Anticipating negligence. Fires.*

An owner of property adjacent to a railroad, who uses it in a natural and ordinary way for purposes to which it is suited, is not called on to anticipate negligence on the part of the railway company, and his failure to so manage his property as to provide against danger from negligent emission of sparks by passing locomotives, is not contributory negligence.

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Syllabus.

3. DANGER OF FIRE. *Use of adjacent property. Right of owner.*

Accordingly, it is error to refuse to instruct that a person owning property contiguous to a railroad has a right to continue to use the property after the railroad has been built *in the same manner as before*, if he takes reasonable care to prevent or extinguish fires.

4. RISK OF ADJACENT OWNER. *Duty of company. Degree of care.*

On the other hand. in taking the land for the right of way, it is to be assumed that the owner was compensated for the enhanced danger from fire caused by the location of the track. This includes the danger of fires accidentally, but not negligently, set out. Therefore, in an action by such owner for the value of property destroyed by fire through the alleged negligence of the defendant, it is proper to refuse to instruct that the defendant is required to exercise the utmost care to prevent the escape of fire, and that the care should be determined by the situation and condition of plaintiff's property, and the method of conducting his business thereon.

5. SAME. *Danger of fire. Duty of company. Use of property.*

The duty of a railroad company is only to run its trains with reference to property along its line providently used by the owners thereof. It is not bound to shut off steam, or otherwise increase precautions while running, because the adjacent property owner carelessly exposes his property to fire.

6. FIRES. *Absence of negligence. Duty of company.*

A railroad company is under no duty to contiguous owners to stop its train to extinguish fires which, without its fault or negligence, are set out by the locomotive.

7. RUNNING TRAINS. *Speed. Negligence. Code* 1880, § 1407.

In an action for the value of property destroyed by the alleged negligence of defendant, where there is evidence that the train which set out the fire was running within an incorporated town more than six miles an hour, in violation of § 1407, code 1880, an instruction for defendant is erroneous which assumes to state the duties of defendant under the circumstances, but is silent as to the presumption of negligence arising under said statute from the rate of speed, if found to be excessive.

8. SAME. *Fires. Definition of negligence. Instruction.*

In an action involving the alleged negligence of a railroad company in emitting sparks and burning adjacent property, the giving of an instruction defining negligence, which, in effect, declares that the company's servants are required only to act with regard to known circum-

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Brief for appellant.

stances, and ignores the fact that not knowing may itself be negligence, will not cause a reversal where the record discloses no material circumstances unknown to such servants, which it is their duty to know and act upon in managing the locomotive.

FROM the circuit court of Warren county.
HON. J. D. GILLAND, Judge.
The facts are stated in the opinion.

Dabney & McCabe, for appellant.

The first instruction asked was correct. It is the one approved in *Railway Co.* v. *Railroad Co.*, 67 Miss., 399. It was error for the court to burden it with a modification suggesting contributory negligence. It was error to modify the fifth instruction, which defines negligence, by requiring that the circumstances should be known to the defendant. It would have been amply sufficient if the defendant had reason to believe that these circumstances existed. Besides, if they did not know, they ought to have known.

The sixth instruction told the jury that the Spenglers might use their property as they had done before the railroad was built. It was error to modify it. Surely property owners have a right to continue to use their property in the same manner as before a railroad is built. They are not required to be deprived of the use of their property. The duty of the railroad company is to run its engines so as not to cause danger.

The modification of the seventh instruction is subject to the same objection, and the modification of the ninth is subject to the objection applicable to the change of the first.

It was error to refuse plaintiff's tenth instruction. Although one should, accidentally and without fault, put in motion that which may result in damage to others, it devolves upon him to make reasonable efforts to prevent such consequences. It was the duty of those in charge of the train, after discovering the fire, to stop the train and extinguish it. We admit that authorities, as to this, are not

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agreed, but the weight and reason is in accordance with our view. 73 Texas, 117; 8 Am. & Eng. Enc. L., 3; *M. & O. R. R. Co.* v. *Gray*, 62 Miss., 383.

The defendant's sixth instruction undertakes to sum up the whole duty of the company under the circumstances. It ignores the fact that the degree of care must be proportionate to the danger. That is a matter for the jury. It ignores the fact that the wind was blowing from the locomotive toward combustible material; that the season was dry—all very material facts, throwing light on the question of negligence. See 77 Ind., 110.

The giving of the seventh instruction was erroneous. It was admitted that the fire was caused by the running of the locomotive. So the instruction is directly in the face of the law that negligence is presumed.

The tenth instruction was irrelevant and misleading. There was no evidence to justify the assumption by the court that if plaintiff had taken proper precaution the fire could have been extinguished. The evidence showed that no effort could prevent the spread of the fire, even if the employes of the mill did not use entire presence of mind. That could not have been expected of them under the circumstances. The best judgment is not to be expected in moments of sudden peril.

Anderson & Russell, on the same side.

It was the duty of the defendant to use the *utmost* care to prevent the emission of sparks and spreading of fire under the circumstances in evidence. The degree of care required is always proportioned to the danger. *R'y Co.* v. *P. L. Co.*, 9 So. Rep., 661; 11 L. Rep., An., 506, note *b*. It was for the jury to say whether it was negligence not to shut off steam in passing the mill.

However carefully the company may have acted, after those in charge of the train saw the fire and had reason to believe it was from the engine, it was their duty to use due

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Brief for appellee.

care to prevent its spreading. Although a railroad company may lawfully burn its right of way, it may not carelessly permit the fire to spread to the property of others. 11 L. Rep., A., 506; 5 *Ib.*, 591; 110 Ind., 538; 124 *Ib.*, 275; 115 N. Y., 579; 73 Texas, 117.

It was not incumbent on the Spenglers to change the location of their mill because the railroad was built near it, nor to change their usual course of business. They were not bound to watch passing trains, and prevent injury from flying sparks. We recognize that it was the duty of the mill employes to try to extinguish the fire, but we submit that there is no proof that they did not act with reasonable prudence under the sudden emergency and peril.

So far as the instructions for plaintiff, announcing the foregoing principles, were refused or modified, there was error.

Miller, Smith & Hirsh, for appellee.

The modification of the first instruction for plaintiff was correct. Without it, the instruction would have conflicted with others. Although an instruction in itself is abstractly correct, it should be made to harmonize with the others in the case. *Railroad Company* v. *Kendrick*, 40 Miss., 375. Besides this, the statute relied on to raise a presumption of negligence does not apply to a case such as this. Plaintiff, without relying on the presumption, has shown the facts tending to prove the negligence.

The attempted definition of negligence, in the tenth instruction, is erroneous. The court and counsel attempted to do what is next to impossible. No two definitions are alike. See 16 Am. & Eng. Enc. L., "Negligence." The one given by the court is rather a statement of what constitutes ordinary care, than a definition of negligence.

The sixth instruction was properly modified. One conducting a business extremely susceptible to fire, should be required to take additional precautions when a perfectly lawful business is established near him, increasing the hazard.

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Brief for appellee.

He may use his property for the same purpose, but not *in the same manner.*

The insertion of the word "known" was proper, but, if not, the error was not prejudicial. No issue was raised by the evidence as to whether appellee knew or not of the dangerous condition of the premises.

The tenth instruction was rightly refused. It was not incumbent on the servants of the defendant to stop the train, and render any sort of assistance in putting out the fire. At the time, the train was moving at a rate of speed variously estimated from four to fifteen miles per hour. Before the train could have been stopped, the alarm had been responded to by all the employes.

Defendant's sixth instruction was based on *Howard* v. *Railway Company*, 66 Miss., 217, and the evidence made it proper.

The language of the seventh instruction is copied from the decision in *Hoff* v. *Railroad Company*, 45 N. J. L., 201. See also 30 Wis., 110; 39 Md., 251; 94 Ill., 448.

It was incumbent on the Spenglers to take precautions against the danger from sparks. They should not place inflammable material in dangerous proximity to the railroad. Ray on Neg. of Imposed Duties, 666; 61 Mo., 38; 29 Ga., 481; 5 Hum., 498; 29 Fed. Rep., 811; 94 Ill., 454; 45 Wis., 222; 22 N. Y., 209.

The case was tried with extraordinary care on the part of counsel and the court. The verdict is correct, and should be affirmed.

Mayes & Harris, on the same side.

There was no error in modifying appellant's instructions by inserting the qualification as to contributory negligence. It is claimed that undue prominence was thus given to the question of contributory negligence. But the evidence shows that there was contributory negligence, both in the management of the mill and in failing to extinguish the fire.

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Brief for appellee.

In the management of the mill, due care was not taken, in view of its location. The mill was on made soil, and the *debris* was very inflammable. Trains were run by it constantly, and ignitions were frequent, but no measures were taken to lessen the danger. The owners seemed satisfied with some small and ineffectual contrivances for putting out fires.

Again, if the employes of the mill had displayed any presence of mind or used even the appliances that had been prepared, the fire could easily have been extinguished. The fact that they forgot every thing, and became hysterical, is no excuse. It was for the jury to say whether they used due care.

The court might well have refused the fifth instruction, and it was not error to modify it by inserting the word "known." Abstract definitions should not be attempted. 16 Am. & Eng. Enc. L., 387. See *Railroad Company* v. *Minor*, 69 Miss., 710; 95 U. S., 439.

We submit that the modification of the sixth instruction was correct. The Spenglers were not required to abandon the purpose to which their mill was applied; but it did require them to alter their methods. There is a broad distinction between the rights of parties along the line of a railway in regard to natural deposits and those non-natural. They may not place the latter near the track, if dangerous. 45 Wis., 222. Moreover, it must be presumed that the necessity for altering methods was considered and allowed for when the right of way was condemned. 1 Greenl. on Ev., § 38; *Isom* v. *Railroad Company*, 36 Miss., 300; 6 Am. & Eng. Enc. L., 573.

There was no legal duty on the defendant to stop its train, and extinguish the fire, if not caused by its negligence. The indifference of its employes to a social duty merely, cannot render it liable. 26 Wis., 537; 70 Mo., 252; 39 Md., 251.

The sixth and seventh instructions for defendant are unobjectionable. They enumerate all the duties necessary to encounter ordinary risks. It was not necessary to shut off

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steam in passing the mill, nor to guard against an ordinary wind, nor to abstain from stoking the fire or lubricating the engine. All the elements going to fix a negative liability are adverted to in these instructions.

COOPER, J., delivered the opinion of the court.

This suit was instituted by the administrators of S. Spengler to recover against the appellee damages for the loss of certain mills and machinery, sustained by the heirs of the intestate, resulting from a fire alleged to have been negligently set out by the servants of the defendant company. After the suit had been brought, the appellant, who had insured the property against loss by fire, paid to the administrators the amount of such insurance, and took an assignment of the right of action, and was admitted to prosecute the suit.

The evidence, so far as it is material to the consideration of the present appeal, may be thus stated:

More than twenty-five years ago the mills, for the destruction of which this suit is brought, were established in the northern part of the city of Vicksburg. The land upon which they were located was broken and irregular, and the dust, bark, shavings and other *debris* of the mills were deposited near them, forming, eventually, a deposit of from eight to eighteen feet. In the year 1883 the defendant company, either by agreement with the owners of the land or by condemnation proceedings, secured a right of way along a line to the west of the mills. The record does not disclose the width of the right of way, but it appears from the evidence that the eastern rail of the road is a little more than twenty-one feet from the spot on which the south-western corner of the building spoken of as the "shingling shed" was located. In preparing its way the company cut down through the deposit of dust, shavings and *debris* spoken of above, to a depth of some eleven to seventeen feet, at a point opposite the shingling shed, until the earth beneath was reached. It then drove down piles, and on these erected a trestle, on

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which its track was laid. The descent of the land to the west was precipitous, and if we have correctly understood the evidence, which on this point is not very clear, the track of the defendant company was on a trestle some twelve to fifteen feet high, which trestle was on an excavated shelf cut along the declivity of the hill west of the mills, the rails of the road being nearly on a level with the surface of the ground which remained between the trestle and the mills. The deposit composing the made surface on which the plaintiff's mills stood, and through which the defendant company cut its way, became, when exposed to the sun and wind, very dry and inflammable. At the time of the fire it was in this condition on the side of the cut made by the defendant's road, and along the surface from the cut eastwards, and to the shingle shed. In the shingle shed the Spenglers had a machine for cutting shingles, and the shavings so cut were permitted by them to accumulate around the shed and on the ground between that building and the track of the railroad adjacent.

On the 29th of July, 1891, the mills and machinery were destroyed by fire, which fire the plaintiffs claim was set out by sparks or cinders which the servants of the defendant negligently permitted to escape from locomotive No. 74, which was at the time drawing a northward bound freight-train over defendant's road.

The evidence of the plaintiff tends to show that the fire was communicated from the engine by sparks, which fell near the shingling shed; that the weather had been for some time dry and hot, and the material along the space intervening between the mills and the road was in a very inflammable condition, as were such shavings as had accumulated around the shingling shed; that a wind was blowing from the south-west at the speed of from ten to twelve miles an hour, and carried the sparks escaping from the engine adjacent to and upon the buildings and shed above described; that the train was, at the time, being run at a high speed,

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variously stated by the witnesses as from six to twenty miles an hour; that the engine was exhausting heavily; that an unusual quantity of sparks and cinders were being emitted—one witness saying that they were as large as his vest-button, and another that they were about the size of the end of his little finger. Several witnesses for the plaintiff say that when the engine was passing along in front of the mills, the fireman was engaged in stoking or coaling the engine, and that this caused an unusual number of sparks to be emitted. One witness for the plaintiff testified that immediately upon the passing of the engine, he extinguished a fire, which was beginning to burn at another spot on the Spenglers' property, and which had been started by another spark from the engine, and that, very soon thereafter, his attention was called to the fire near the shingling mill, which spread with great rapidity, and destroyed the mills. Another witness stated that a burning cinder was lodged on the top of the shed, but did not burn, and that immediately afterwards the fire at the shingling shed began to spread. It is said by counsel for appellant that the wires of the spark-arrester used in engine No. 74 had become worn by use to such an extent as to be out of repair. This part of the engine was exhibited to the jury, and has been brought here for our inspection, but we have not thought it important to examine it.

The plaintiff also proved that, at the rate of speed at which the train was running in approaching the mill, the steam might have been shut off entirely, and the train would, by its momentum, have run by the mills, and that, so running, no sparks would have been emitted; and also that the rule of the company was that trains, in passing stations or cars on which cotton was deposited or loaded, should, if practicable, shut off steam; also that the wheels of the engine No. 74 slipped as it passed the mill, and that this was evidence that it had on too much steam.

For the defendant, evidence was introduced tending to prove that engine No. 74 was provided with all necessary

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and proper appliances to prevent the escape of fire, and that the same were in good repair; that the servants of the defendant in charge of the engine were competent; that the fireman was not engaged about the fire when the engine was passing the mills, but was busy adjusting the lubricator of the engine, and that the engineer was overlooking the work, to see that it was properly done; that the rate of speed was not over nine miles an hour, and that the engine was under a light head of steam, and was working lightly; that the engine was not exhausting to an unusual or unnecessary extent, nor emitting in unusual quantity sparks and cinders, nor were those emitted of an unusual size.

The train drawn by this engine was shown to have been composed of thirty-six loaded cars, which was not an unusual number. There were on the train three brakemen, the forward one being on the third car from the engine, the other about the middle of the train, and the third near the rear. Two of them and the conductor, who was in the caboose, saw the fire as the train passed. The front brakeman said it appeared to be about the size of a barrel head, the one to the rear of the first thought it was larger, and the conductor thought it was seven or eight feet in circumference.

On cross-examination of the witnesses for the plaintiff, it was shown that barrels of water were kept upon the mills and upon the ground adjacent to the buildings for use in extinguishing fires. The manager of the mills, who first reached the fire, endeavored to extinguish it by smothering it out with shavings and other stuff, and, as he says, did not think of using water from some barrels which stood near by; but he also stated that the progress of the fire was so rapid that he would not have had time to bring and apply the water. This witness also stated that all of the employes about the mills were charged with the duty of watching for fires and extinguishing any which might occur.

It was shown generally by the witnesses that the material which had been for years deposited around the mills, and

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through which the defendant cut in making its road-way, was of an inflammable nature when dried, and that, in the operation of the mills, the wagons used in and about its business passed along the strip between the mills and the railroad, and the material over which they passed, being crushed, soon dried out and became fuzzy and much more inflammable than before.

For the plaintiff, twelve instructions were asked. Nine of them were given, some with modifications, and three were rejected. So many of these instructions as it is important to consider are set out, and the modifications added by the court are set out in italics.

"1. If the jury are satisfied, from the evidence in the cause, that the property mentioned in the declaration, or any of it, was destroyed by the act of the defendant, or its employes, in the running of its locomotive, the law presumes that the loss was occasioned by the want of reasonable care of defendant, and unless such presumption is rebutted by evidence in the cause, then the jury should find for the plaintiff, *unless it should further appear from the evidence that the Spengler heirs or employes were guilty of contributory negligence, as elsewhere explained.*"

"4. If the jury believe, from the inspection of the wire netting used in engine No. 74 at the time the fire occurred, which has been produced by the defendant before the jury, *and from all the evidence in the case in relation thereto*, that the same was not in good order and repair at the time of the fire, but the meshes were enlarged by long use, whereby the sparks could be more easily emitted, and were, by reason of that fact, emitted, and set fire to the property in question, then they should find for the plaintiff, *unless the Spengler heirs or employes were guilty of such contributory negligence as to preclude plaintiff from recovery.*

"5. Negligence is the failure to do what a reasonable and prudent person would do under the *known* circumstances of the situation, or the doing what such a person under *known*

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existing circumstances would not have done. The essence of the fault may lie in the omission or commission. The degree of care to be exercised in a given case must be in proportion to the *known* apparent dangers of the situation.

"6. The jury are instructed that while a person using property contiguous to a railroad may not be reckless in its use in respect to dangers from fire, yet such person has the right to continue to use property, after a railroad has been built, *for the same purposes* as before, if reasonable care and precautions are taken to prevent and extinguish fires."

This instruction was modified by the court by striking out the words "in the same manner," and substituting therefor "for the same purposes."

The following instructions, asked by plaintiff, were refused:

"10. If the jury believe, from the evidence, that the fire was set by sparks from the defendant's engine, and the conductor and other employes on the train saw it, and knew, or had good reason to know, that it had been so started, then it was the duty of the defendant's employes to use every reasonable effort to extinguish such fire if it could have been thus accomplished. Defendant, though without negligence, in setting fire to the property of others, should not, with indifference to consequences, permit it to burn and destroy the property where it might be put out by reasonable efforts by its employes, and cannot, in such cases, afterwards justify itself upon the ground that there was no negligence in the original setting the fire, if it failed to use such efforts in a case where the fire might thus have been extinguished."

"11. The court instructs the jury that the defendant, in running its train by plaintiff's property, which was a wooden structure, and which had combustible material lying in and about the same, and which was very near to the defendant's railroad track, was required to exercise the utmost care to prevent the spread of fire from sparks emitted from its engine, and especially, if they believe from the evidence that, at the time said fire was communicated to said property, the

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wind was blowing in the direction from the engine towards the property; that under such circumstances defendants were bound to exercise a greater degree of care than would be required of them in running trains in the country where there is no property near the track exposed to fire, and if, from the want of such care, fire, in large and unusual quantities, was permitted to escape from the engine upon plaintiff's property, whereby said property was consumed, the defendant is liable for the damages sustained.

"12. The court instructs the jury that the degree of care which is required of the defendant in running its trains is to be proportioned to the danger to be apprehended of inflicting injury on the person or property of others, and that the agent controlling the engine was bound to exercise the utmost vigilance while operating said engine by plaintiff's property in the city of Vicksburg; and, if they believe from the evidence, that from the faulty construction of the engine or from the want of proper appliances upon it to prevent the escape of sparks in large and dangerous quantities, or if, from the failure to have such appliances so adjusted or repaired as to prevent the escape of sparks in large and dangerous quantities, or from the negligent and unskillful management of the engine, or from the want of such care, the property of plaintiff was destroyed, the defendant is liable."

Among other instructions given for the defendant, were the following:

"6. If the jury should believe, from the evidence, that engine No. 74 was provided with the most approved appliances to prevent the emission of sparks, and that the same were in good order and repair, and that at the time she was passing Spengler's mills on July 29, 1891, she was in charge of a competent engineer and fireman, and that said engine had a light head of steam, and was working light, and that the fireman, Joe Dana, was adjusting the lubricator, and that the engineer, Jones, was watching him, then they will find a verdict for the defendant.

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"7. If the jury believe, from the evidence, that defendant's engine No. 74, with a train of cars attached, was run past Spengler's mills with a light head of steam, and that the engineer did not put on or use an excessive amount of steam, and that the fireman did not disturb the fire, and that said engine was in good order and repair, and was provided with a spark arrester of an approved pattern in general use and good repair, then they will find a verdict for the defendant, even though they may believe that the mills caught fire from sparks emitted from said engine.

"9. The court instructs the jury for the defendant, that the law does not justify a person on leased grounds in the immediate vicinity of a railroad, and there carrying on the business of manufacturing shingles and lumber, which produce shavings and sawdust, to conduct such business with a reckless want of care; nor does it authorize said lessee to recover against the adjoining railway company for loss which the use of due care would have prevented; and if the jury believe, from the evidence, that the said Spengler heirs conducted a business of this kind, and that the fire could have been prevented by due and prudent care in carrying on said business on the part of those in their employ, then under no circumstances can they recover in this action.

"11. The court instructs the jury for the defendant, that if Theobold, Buchanan and the other employes of Spengler, at or about the scene of the fire, could have put out the fire, after discovering it, by the exercise of reasonable diligence, and that they, or either of them, failed to exercise such reasonable diligence in putting out said fire, then they must find a verdict for the defendant."

The action of the court in modifying the first instruction for the plaintiff, must be considered in connection with the ninth and tenth instructions given for the defendant.

By the first instruction, the court was requested to charge the jury that, if the injury resulted from the negligence of the defendant, the plaintiff was entitled to recover. This in-

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struction the court modified by adding the proviso, "unless it appears from the evidence that the Spenglers were guilty of contributory negligence, as elsewhere explained." By the ninth and tenth instructions for the defendant, the court instructed what would constitute such contributory negligence.

The tenth instruction for the defendant told the jury that if Theobold, the general manager of the business of Spengler, or Buchanan and the other employes of Spengler, could have put out the fire after it was discovered, and that they, *or either of them*, failed to exercise reasonable diligence in putting out the fire, the plaintiff could not recover.

In consideration of the fact that Mr. Theobold, the general manager, testified that every employe had been charged with the duty of extinguishing fires, if any should occur, we find no fault with this instruction as announcing what would be contributory negligence. We indicate the ground upon which it is sustained, in order that the instruction may not hereafter be invoked as a precedent for the rule that the negligence of an inferior or menial servant, charged with no duty and vested with no authority touching the preservation of the property of his principal, is to be imputed to the principal.

The ninth instruction for the defendant informed the jury that the plaintiff could not recover if the Spenglers were negligent in the method of conducting the business, and that "the fire could have been prevented by the exercise of due and prudent care in carrying on said business."

There is conflict in the decisions of the American courts, and this instruction finds support in many decided cases. The weight of authority, however, and the better reason, in our opinion, is that one who uses his land in a natural and ordinary way, for purposes to which it is suited, is not required to anticipate negligence by the adjacent railway company, and his failure so to manage his business as to protect his property from loss against such negligence is not contrib-

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utory negligence on his part, which will prevent a recovery against the company. 8 Am. & Eng. Enc. L., 16, note 1.

In the case of *Salmon* v. *Delaware Railroad Co.*, 38 N. J. L, 5, Chief Justice Beasley, delivering the opinion of the court, said:

"A person is not called on to anticipate negligence on the part of another, and, by way of prevention, to make provision against its effects. The fire in question, upon the facts stated in these pleadings, was caused solely by the illegal act of the defendant, and there is no provision of law which required the plaintiff to foresee the doing of such an act, and to put his own land in a situation to withstand its effect. He owed no duty to the defendant in this respect, and consequently negligence, in its legal sense, cannot be imputed to him. . . . I am aware that it has been ruled in Illinois that the owners of lands contiguous to railroads are as much bound to keep their lands free from dry grass and weeds as the railroad company is on its roadway, but I regard such cases as opposed to well-settled legal principles. *Railroad Co.* v. *Shanefelt*, 47 Ill., 497; *Railroad Co.* v. *Frazier*, *Ib.*, 505; *Railroad Co.* v. *Nunn*, 51 Ill., 78.

"If this is the doctrine of the law, it is, I think, entirely manifest that the long line of decisions on the subject of careless use of fire by a proprietor on his own property, which we find in the books, have been rendered in utter disregard to this important condition. The ruling of the courts has invariably been that every proprietor is responsible for the ordinary and natural consequences of the careless use of fire on his own premises, and this, without the least reference to the condition of the adjacent lands to which the conflagration has spread. No support in any of these authorities can be found for the assumption that, if a land-owner places his stacks of grain or hay on the confines of his land, that thereby, in a legal point of view, he becomes a contributor to a fire occasioned by negligence on the land of his neighbor. By such an act, it is true, he takes the risk of the con-

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sequences of an accidental fire on the contiguous premises, but not of a neglect which he can be called upon either to anticipate or to guard against."

Among other cases in which the same rule is announced are *Railroad Company* v. *Hendrickson*, 80 Pa., 182; *Railroad Company* v. *Schultz*, 93 *Ib.*, 341; *Burlington Railroad* v. *Western*, 4 Neb., 268; *Railroad Company* v. *Medley*, 75 Va., 499; *Vaughan* v. *Railroad Company*, 3 H. & N., 427.

It follows, from what we have said, that it was error to modify the first instruction for the plaintiff, and to give the ninth for the defendant. For the same reason, the sixth instruction, as asked, was correct, and should have been given.

The modification of the fifth instruction for the plaintiff was probably made to exclude the conclusion that negligence should be predicated of the failure of the engineer to manage his engine with reference to the inflammable condition of the mills and their surroundings, unless the jury should believe that such condition was known to him. Definitions are dangerous things in all cases, from the difficulty of expressing accurately a short formula which shall include all principles intended to be included, and yet exclude all intended to be excluded. It is true ordinarily that, one charged with negligence is to be tried with reference to his conduct under the *known* circumstances of the situation in which he acted; but it may be that not knowing existing circumstances is itself negligence. The modification of this instruction was, in effect, to tell the jury that the servants of the defendant were not guilty of negligence in not knowing any of the unperceived or recognized circumstances of the situation. Ordinarily, this would be erroneous, as an instruction on the weight of testimony; but a careful review of the evidence in this cause, and an attentive reading of the briefs of counsel, suggest no unknown circumstance with reference to which it was the duty of the servants of the company to know and act in the management of the engine, as will appear hereafter when we come to consider the extent of the duty due from

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the defendant to the Spenglers. We would, however, observe that a nice and discriminating accuracy in defining cannot be required of trial judges acting on the moment, and without access to the books. The authors of the article on negligence in 16 Am. & Eng. Enc. L., page 389, give definitions of that word by Alderson, Pollock, Britt, Judge Swayne, Bishop, Smith, Austin, Wharton and Shearman & Redfield, and cite some thirty decisions in which other definitions have been given, but construct a definition somewhat different from all others. They define actionable negligence to be "the inadvertent failure of a legally responsible person to use ordinary care, under the circumstances, in observing or performing a non-contractual duty implied by law, which failure is the proximate cause of injury to a person to whom the duty is due." It is probable that any one of the definitions referred to in the article would be held sufficiently accurate as an abstract proposition in an ordinary trial. The facts of an exceptional case might require any one of them to be somewhat modified.

The tenth instruction for the plaintiff was properly refused. If the rule contended for thereby, that railroad companies are responsible for fires set out from their engines without negligence, but the spreading of which might have been prevented, exists under any circumstances, it certainly has no application under any of the developed facts of this case.

Fires from running trains are always to be apprehended, and if it is the duty of those in charge of a running train to stop its progress to put out a fire set by the engine without negligence, it would be equally their duty to see that all sparks and cinders, from which danger from fire might reasonably be anticipated, were extinguished. If the company is under a duty to extinguish non-negligently set fires when known to exist, it must be under the same duty in reference to such fires of the same character as the circumstances show will or may probably spring up. Under the principle of this instruction, railroad companies would be responsible abso-

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lutely for all fires set out by their engines, or would find immunity only upon condition of keeping constant and instant supervision over every foot of their road over which a train was passing, or had recently passed. It is manifest that the duty which these companies owe to the public, and which can only be discharged by running their trains upon schedules at stated intervals, could not be performed at all if the persons in charge of trains should be required to give their attention to fires along the way, and that the danger to life and property intrusted to them would be greatly increased by requiring trains to be stopped at all times and places, in order that the servants of the company may engage in putting out fires, whether the same be negligently or accidentally set out.

The sixth and seventh instructions for the defendant announce the proposition that if the engine by which the fire is claimed to have been set, was properly constructed and supplied with approved appliances to prevent the escape of fire, which were in good repair at the time, and that the engineer and fireman were competent, and ran the engine by the mills under a light head of steam, then the defendant had discharged its whole duty to the plaintiff's intestate, and no recovery could be had, even though the fire was set out from the engine.

The eleventh and twelfth instructions asked by the plaintiff, and which were refused, announced, in effect, the proposition that the defendant was required to exercise the utmost care to prevent the escape of fire from its engines, and that what this care should have been was determinable by the condition of the property of plaintiff's intestate, his method of conducting his business, the season of the year, the direction of the wind and the apparent danger of fire being communicated from the engine to the property situated and conditioned as it was at the time of the fire.

These instructions may be considered together, for they contain a fair exposition of the principles contended for by the parties respectively, the defendant asserting that if its

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servants managed the engine as stated in the sixth and seventh instructions, it had performed its whole duty to the plaintiff's intestate, while the plaintiff's counsel insist that, even though the servants of the company had acted as stated in these instructions, *non constat* that they were not guilty of negligence in not acting with greater care and circumspection, and that the court should have refused these instructions for the defendant, and given the eleventh and twelfth asked by the plaintiff, in order that the jury might have determined whether, under all the circumstances, the requisite care had been taken to relieve the defendant from negligence. The plaintiff's counsel especially insist that the defendant was bound to increase its care in proportion to the danger in which the mills stood of taking fire from a moving train, even though that danger was caused, in whole or in part, by the business to which the property was devoted and the method in which the business was conducted; and they contend that it was the duty of the servants of the defendant in charge of the train to shut off steam from the engine, and permit the train to roll by the mills, by its momentum, if that could be done without unreasonably delaying the train, if, by so doing, the danger of fire would have been obviated.

We cannot agree with the contention of either party. The instructions for the defendant, now under consideration, were erroneous, for the reason that they did not exclude the imputation of negligence arising from the excessive rate of speed at which the train was running within the corporate limits, if it was so running. Section 1047, code 1880, provides that "any railroad company, having the right of way, may run locomotives and cars, by steam, through towns, cities and villages at the rate of six miles an hour, and no more; and if, in passing through any town, city or village, any locomotive or car should be run at a greater rate of speed, the company shall pay one hundred dollars, to be recovered by suit in the name of such town, city or village, and for its use; and the company shall, moreover, be liable for any damages or injury

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which may be sustained by any one from such locomotive or cars whilst they are running at a greater rate of speed than six miles an hour through any city, town or village."

The instructions for the plaintiff were properly refused.

The plaintiff's intestate had been paid, we suppose, in the condemnation of the land, if it was condemned, or in its sale, if it was sold to the company, for the enhanced danger to their mills by the location of the track of the company. Whether, in fact, this was taken into consideration or not, we do not know; but it was a proper matter for consideration in the estimate of damages, and we must assume that it was compensated for in the sale or condemnation of the property. For all damage which might be done by accidental fires not negligently set out by the company, they have, in contemplation of law, been already paid. To get, first, damages for the land because such fires might occur, and then damages for the fire when it occurs, is to receive double compensation. So, also, to get compensation for land —as we must suppose was done—upon the theory that the trains would be run as trains usually are, and that, so running, a certain degree of danger from fire must exist, and then to compel the company to run its trains, not with reference to its business, but with reference to his, is to give the land-owner compensation for the use of the land, and then deny to the company the use for which it has paid. As we have said, the plaintiff's intestate was not bound, because the road had been located alongside his mills, to change his business or to act, in conducting it, with reference to a negligent use of its trains by the defendant; but the fact that he voluntarily continued to conduct the business in a manner which increased the danger from fire, could not impose on the defendant the obligation to so alter the management of its affairs as to afford him immunity from fires. So long as the company so ran its trains that negligence could not be imputed to it in reference to property along its line prudently used by its owners, it was exempt from liability; the plaint-

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iff's intestate could not, by conducting his business in a careless manner, impose upon the company the additional burden of a greater care, made necessary by his own conduct.

There was no obligation on the defendant to shut off steam and permit its train to roll by the mills; we know from universal custom that trains are not so run. If the plaintiff's intestate had the right to have the trains so run by his mills, so, also, had every other property-owner who had placed his stacks of hay or grain, or other inflammable property, near enough the track to be equally endangered by running trains. True, one in charge of an engine must act in reference to the circumstances. It would be negligence for an engineer to empty his fire-box on a wooden bridge, or in a place in which unusual danger would be threatened by so doing; but this is because the fire-box may as well be emptied at other points, from which less danger would be threatened. But to hold that steam must be cut off in passing the property of the land-owner, or that the fires of the engine must not be replenished as occasion may require, because a slight wind is blowing towards his buildings, would be to deny the right of the company to transact its business in the usual and necessary manner.

As was said by Judge Campbell in *Michigan Central Railroad* v. *Anderson*, 20 Mich., 250, "vehicles that can choose their track, and can deviate whenever and wherever it is desired, may properly be required to be used differently, according to circumstances. But the necessity of running railroad cars with regularity and uniformity is not a matter of convenience merely. The business cannot be done at all, unless calculations are made upon the movement of trains. And the risks attendant upon a disturbance of that regularity are risks of human life, and not mere business delays. It would be not only vexatious, but in the highest degree dangerous to make the movement of trains vary with wind and weather. Those who establish themselves in the neighborhood of railroads, must know that the trains are expected to

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run with regularity; and if there are special risks, arising from no want of care in the proper equipment and management of engines and trains, those risks are not chargeable to the railroad, but are incidents of the situation. And extra care, which they demand, must, therefore, devolve upon those whose interests require the increased vigilance, and the consequences of not exercising it, must fall upon the owner, because the railroad is not in fault."

We have hesitated to disturb the verdict in this case, notwithstanding the errors of law; but, in view of the fact that the evidence tends to prove that the train was being run in the limits of the city of Vicksburg at a rate of speed not allowed by law, which speed may have increased the danger of putting out fire from sparks and cinders, and also because some of the testimony for the plaintiff, if believed by the jury, would show that sparks and cinders of unusual size and quantity, such as could not be emitted by an engine properly equipped, were emitted on the occasion of the fire, we are unable to say, with confidence, that no prejudice was done to the plaintiff by the errors noted.

The judgment must be reversed, and a new trial awarded.

EMILE BONELLI ET AL. v. G. A. BOWEN.

1. EVIDENCE. *Impeachment of witness. Certainty. Practice.*

In laying the predicate for the impeachment of a witness, he should be apprised of the time, place and persons present when the supposed conversation took place; and, on the examination of the impeaching witness, he should be confined to the inquiries propounded in the predicate, and should not be asked or permitted to state generally what took place on the occasion inquired about.

2. DECLARATION. *Damages. Matters in aggravation.*

Where, in an action for damages, the declaration alleged that defendants,

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Statement of the case.

in an attempt to collect a debt, forcibly, and against her remonstrance, entered plaintiff's house while she was disrobed, and seized a certain check and demanded of her to indorse it, and took it away, to the damage of plaintiff, etc., the gravamen of the action is the taking of the check, and the other matters are merely in aggravation of damages.

3. MATTERS IN AGGRAVATION. *Violation of law. Burden of proof.*

Although such acts relied on in aggravation of damages amount to violations of criminal law, the defendants are not entitled, in such action, to presumption of innocence; nor is the burden on plaintiff to prove them beyond reasonable doubt, but only to establish the substantial matters, by a preponderance of evidence, to the satisfaction of the jury.

4. DAMAGES. *Mental suffering. Compensation. Punitive damages.*

In such case, mental suffering of the plaintiff is an element of compensatory damages, and it is proper to instruct that the jury may, in estimating damages, consider plaintiff's mental anguish and suffering, if any, and, in addition, may, if deemed proper, award punitive damages.

FROM the circuit court of Warren county.

HON. J. D. GILLAND, Judge.

Action by appellee, Mrs. G. A. Bowen, against E. Bonelli, B. C. Bonelli and Frank Bonelli. The amended declaration, which contains two slightly varying counts, alleges in the first count as follows: That defendants, on September 26, 1891, with force and arms broke and entered the dwelling-house of the plaintiff in the night-time, when plaintiff had disrobed, and was preparing to retire, and greatly disturbed her in the quiet possession of her dwelling-house, and forcibly, rudely, angrily and in a threatening manner, against the remonstrance of plaintiff, entered her room, and, without process of law, searched her room, and seized and took violently and forcibly a certain draft given by one Jake Dornbush, on The Delta Trust and Banking Company, for $75, and forcibly, rudely and angrily insisted upon her indorsing the draft, and when she refused, wrote her name across the back of it, and took the same away; and then and there greatly soiled, damaged and spoiled her household goods and furniture, and upset the room and furniture, and put plaint-

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iff in great terror and fear of her life and safety, to her great damage, $20,000, etc.

The second count differs from the first only in alleging that the defendants, in committing the wrongs, were intending and contriving to collect a debt due them by plaintiff's husband, and in omitting any mention of damage to household goods and furniture.

The cause proceeded to trial upon defendants' plea of not guilty.

It is not deemed necessary to set out the evidence in full. That of the plaintiff supported, or tended to support, her declaration, while that of defendants contradicted her in every material matter, and was to the effect that they entered plaintiff's house through the open door with her consent, and that she delivered the draft to them in part payment of a debt due them by her husband.

Nels Anderson and John Tipton were examined as witnesses for the defendants, and their testimony was mainly corroborative of that of the defendants. Anderson was questioned, on cross-examination, as follows:

Ques. "Do you recollect having had a conversation with Mr. McLaurin here?"

Ans. "Yes, sir."

Ques. "Didn't you have a conversation with him here this morning?"

Ans. "Yes, sir."

Ques. "Didn't you state to him that you didn't know whether Mrs. Bowen signed the check or not?"

Ans. "I say that now. I don't know positive whether she signed it. No, sir; I didn't say that."

Ques. "Didn't she ask you to go right away, and stop payment of the check, saying she had been robbed?"

Ans. "No, sir."

Ques. "Didn't you state that to Mr. McLaurin in the court-room?"

Ans. "No, sir."

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Statement of the case.

Ques. "You know Mr. McLaurin?"

Ans. "Yes, sir."

Ques. "Didn't you tell him that this morning here?"

Ans. "No, sir; I never told Mr. McLaurin that she said she had been robbed."

Ques. "In that conversation with Mr. McLaurin here this morning, did you state that she came to the door crying, after the Bonellis had left, stating that she had been robbed, and asking you to have Mr. Dornbush stop payment of the check?"

Ans. "No, sir. I told her that myself."

John Tipton was asked the following questions on cross-examination:

Ques. "Do you recollect Mr. Dornbush coming down here last Monday, and having a conversation with Ben Holland, Amos Holland and yourself?"

Ans. "Yes, sir."

Ques. "Do you recollect, in that conversation there, hearing it stated, and you assented to it, that Ben Holland peeped through the crack and saw Mrs. Bowen holding on to the check, and refusing to give it up, crying and saying it was her own, and she could not part with her property that way?"

Ans. "No, sir."

This witness was also asked by Mr. W. K. McLaurin, one of the attorneys for the plaintiff, if he did not recollect when Ben Holland and himself had talked with witness about the case. To which the witness replied affirmatively, and was then asked if he did not say "it was an outrage, and Mrs. Bowen ought to get big damages for it." Witness denied having made this statement.

Thereupon, Jacob Dornbush was examined in rebuttal for plaintiff, and testified that he recollected a conversation with Ben Holland, Amos Holland and Tipton on the preceding Monday, in which Ben Holland made a statement, to which Tipton assented, the substance of which was that when the Bonellis went into Mrs. Bowen's house, they asked her for

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the check; that she held it in her hand by one corner, and that one of the defendants had hold of it, and wanted her to sign it; that said witness, in that conversation, stated they had seen enough to win the case; that they further stated that Mrs. Bowen was in her night-clothes, and asked the Bonellis not to come in, and that they did not see her indorse the check, but saw defendants take the check, and refuse to surrender it. A motion to exclude this testimony was overruled.

W. K. McLaurin was also examined in rebuttal, and testified, over the objections of defendants, that he had that morning had a conversation in the court-room with Anderson, who had been subpœnaed for plaintiff. McLaurin was asked to state what took place, and replied: "He [Anderson] told me when they went in that he didn't know whether Mrs. Bowen signed the check or not, and that immediately after the Bonellis left, she came to the door crying, and, saying she had been robbed, asked him to go to Mr. Dornbush and have him stop payment of the check."

Witness further testified: "I had a conversation with Tipton one day last week about this case. I was down on Washington street, where this thing occurred. Ben Holland walked up to me and mentioned the case, and, in the presence of Tipton and myself, said 'it was a damned outrage.' Tipton heard it, and assented to it, and said it was right. Ben at first told me that occurred in Tipton's presence, and he repeated what he first said, and Tipton assented to it, and said 'our testimony will win the case.'"

By the instructions given for the plaintiff, the jury was told that, if it found for the plaintiff, it could take into consideration the mental anguish and suffering of the plaintiff, if any, in estimating her compensatory damages, and, in addition, might, if it deemed proper, award vindictive or punitive damages.

The following instruction, asked by the defendants, was refused:

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Brief for appellants.

6. "The allegations in the declaration charge indictable felonies, and must be proven to a moral certainty, and to the exclusion of every reasonable doubt arising out of all the evidence in the case. A bare preponderance of evidence is not sufficient."

The eighth, ninth and tenth instructions for defendants, refused by the court, were to the effect that the jury could consider as a circumstance in the case the failure by the plaintiff to introduce witnesses summoned by her and present during the trial.

There was a verdict for plaintiff for $500, and judgment accordingly. Motion for new trial overruled, and defendants appeal.

Dabney & McCabe, for the appellants.

1. It is well settled that the gravamen of the suit must be proved, and that proof of the matters stated in aggravation of damages will not be sufficient. 1 Sutherland on Damages, 769. The gist of this action is clearly the forcible breaking and entering of plaintiff's dwelling. All else is matter in aggravation. We submit that the evidence fails to show any forcible entry into the house. If so, it is useless to inquire if the other matters complained of are proved.

2. The admission of the testimony of Dornbush and McLaurin to impeach Anderson and Tipton was error. The latter had not had their attention called to the time, place and precise language supposed to have been used. They had no fair opportunity to deny the conversation. The testimony of Dornbush and McLaurin does not contradict Tipton in any essential particular, but, under the guise of doing so, they give hearsay statements and conclusions. This evidence must have been controlling with the jury.

3. The court erred in refusing the eighth, ninth and tenth instructions. It was manifestly the duty of the plaintiff to put on the stand the witness subpœnaed by her and present, especially in view of her manifest desire to work in the opin-

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Brief for appellee.

ions and statements of these witnesses under the guise of rebutting evidence.

4. The court erred in giving instructions permitting a recovery upon a bare preponderance of the evidence. The offenses charged in the declaration were criminal, being burglary, robbery and forgery. Defendants are entitled to the presumption of innocence. 19 Am. & Eng. Enc. L., 1085. The instructions nowhere told the jury what was the gist of the action. They should have announced that this was the forcible breaking and entry into the house.

5. The offenses charged being criminal and highly penal, punitive damages are not allowable. It is left to the state to punish crimes. 76 Ill., 241; 73 *Ib.*, 69; 35 Iowa, 9; 7 Allen, 118; 4 B. Mon., 378; 7 Col., 541. In view of the varying authorities, we submit this point with diffidence. See 1 Sutherland on Damages, 739.

6. It was error to instruct that mental suffering might be considered in estimating damages, and, in addition, punitive damages might be awarded. Damages for mental suffering are included in punitive damages.

Miller, Smith & Hirsh, for appellee.

1. It cannot be seriously contended that the verdict is unsupported by evidence.

2. Sufficient foundation was laid for the contradiction and impeachment of Tipton and Anderson by Dornbush and McLaurin.

3. There is no rule that requires a party to examine every witness summoned. The witnesses were in court and available to the defendants.

4. Damages for mental suffering are compensatory, not punitive, and the jury was properly instructed that it might find such compensation, and, in addition, vindictive damages.

5. A preponderance of evidence is all that is necessary in a civil action, although a crime is imputed. 19 Am. & Eng. Enc. L., 1085.

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Opinion of the court.

WOODS, J., delivered the opinion of the court.

The testimony of the witnesses, Dornbush and McLaurin, offered in rebuttal, for the purpose of impeaching the witnesses, Anderson and Tipton, should have been excluded. The impeaching witnesses were not directed and confined to the inquiries propounded to Anderson and Tipton in laying the foundation for the introduction of impeaching evidence. They were asked generally to state what took place or what passed on the occasions referred to, and were permitted to state matters of fact not embraced in the predicate laid for contradiction, as well as to repeat to the jury the conclusions of mind arrived at by Anderson and Tipton.

The witnesses sought to be impeached should have been distinctly informed as to time, place and persons present when the supposed conversation took place, and the matter as to which it was designed to call impeaching witnesses should have been clearly and distinctly presented to their attention. And to the matters thus inquired about, the impeaching witnesses should have had their examination strictly confined, and should not have been asked to state what took place on the occasions referred to, and, in response, allowed to go outside of and beyond the issue presented in the predicate laid. The examination of the witness Dornbush was especially objectionable. By Dornbush's own vacillating statements it is left uncertain whether Tipton was even present when the conversations with Anderson occurred, and which, by assent, Tipton was supposed to have participated in to the extent of making Anderson's statements his own, as was attempted to be shown by Dornbush. The latitude of examination and reply, in the rebutting testimony, was unfair to the witnesses sought to be impeached, as well as hurtful to the appellants, and, because of the errors assigned in this particular, the judgment must be reversed.

The contention of counsel for appellant, that the gist of the complaint is the forcible entering of appellee's house, and that all its other recitals and averments, including the violent

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seizure and carrying away of Dornbush's check, against the will of Mrs. Bowen, are matters stated merely in aggravation of damages, is without foundation. Her deprivation of the Dornbush check is the substantial offense charged in her declaration, and the other matters are averred in aggravation of damages. There is no burglary alleged, but only an entering with rudeness, and despite the remonstrance of the person whose house was invaded. This was only preliminary, and leading up to the real offense complained of, to wit; the taking by force, and carrying away against the will of the owner, the check of Dornbush.

There was no error in the refusal of the court to give the eighth, ninth and tenth instructions asked by appellants. We know of no reason why a litigant in a civil case shall be required to put upon the stand every witness, material or immaterial, whom he has had subpœnaed, and counsel have cited no authority in support of this view. It is certainly not the rule in this state, where it has been held by this court that, in prosecutions for the highest crimes, the counsel for the state cannot be required to put upon the stand all the witnesses whose names are indorsed on the indictment, and who are actually present in court. *Morrow* v. *State*, 57 Miss. In that case, the known bias of the two eye-witnesses to the killing, whom the state's counsel refused to introduce, was sufficient warrant for the counsel's declining to put them upon the stand, and vouch for their credibility. We are wholly unable to see why, in the case at bar, the appellee should be required to put upon the stand, and vouch for their credibility, witnesses whom she knew to be not in harmony with the statements she had already made under oath, and which fairly made out her case, if unchallenged and unopposed. To have done so would have utterly destroyed the case she had made by her own evidence; and this she could not have been required to do. But, in view of the fact that the witnesses whom the appellee subpœnaed and refused to examine, were in court, and actually put upon the stand

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(two of them, at any rate) and examined for appellants, there seems to us no ground for complaint that all the eye-witnesses were not heard, and the jury put in possession of the facts as seen by the various spectators of the events transpiring on the night in question.

The views hereinbefore expressed will largely obviate the necessity for any large examination of the fourth and chief contention of counsel for appellants. We have already declared that the complaint did not charge a burglary by appellants, but that the gravamen of her declaration was the forcibly taking and carrying away, against appellee's will, of the Dornbush check. The theory of the learned counsel is repudiated by us, and there was no room for any application of the presumption of innocence. When the *onus probandi* has been successfully borne by appellee to the extent of reasonably satisfying the mind of the jury as to her right to a recovery on the substantial matter charged in her declaration, she has met the requirement of law, and presumptions of innocence on the part of appellants could not be thrust at appellee, with the demand that she now destroy them, in addition to proving her case by a preponderance of the evidence. The infirmity of the theory of counsel is that it rests upon the baseless assumption that a recovery was sought for breaking and entering the house of appellee, and not for the depriving her of her property. The circumstances recited by way of aggravation of damages, are erroneously believed by counsel to constitute the gist of the offense complained of.

What is demanded now to be further said on the fourth contention of appellants, as to the action of the court in giving appellee's instructions and refusing appellant's seventh charge, may be compressed into few words. The counsel are mistaken in supposing that the jury was authorized by the instructions complained of to award vindictive damages twice in this case. The mental suffering of appellee, the jury was clearly and properly informed, was an element to

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be considered by it in estimating the compensatory damages to be awarded the appellee, and, in addition to these compensatory damages, including damages for mental suffering, the jury was instructed, properly, too, that exemplary damages might be awarded by way of punishment. The contention of counsel on this point, arises, we think, out of a total misapprehension of the meaning of the instruction given for appellee, in which the jury was advised as to the measure of damages to be employed in estimating appellee's right to recovery.

We find no error in the action of the court in giving and refusing instructions.

Reversed.

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G. W. HOLMES v. H. M. PRESTON ET AL.

1. BILL OF EXCHANGE. *Irregular indorser. Liability. Evidence.*

In an action on a bill of exchange against one who was not payee, and who is not shown to have been holder thereof, or to have had any connection with it except to write his name on the back, the mere introduction of the bill and the protest thereof for non-payment by the acceptor, will not entitle plaintiff to judgment. To fix liability on such defendant, there must be additional evidence showing the capacity in which he indorsed the paper, and notice of dishonor if his liability is secondary. *Thomas* v. *Jennings*, 5 Smed. & M., 630.

2. JEOFAILS. *Verdict. Insufficient evidence. Pleading. Code*, 1892, § 746.

The statute of jeofails cures only defects of *pleading*. Where the facts are made of record by demurrer to evidence, they must show a right of recovery in order to sustain a verdict for plaintiff. If such right does not appear, after verdict, it will not avail plaintiff that the declaration, being insufficient, was not demurred to, and that the evidence fully supports the allegations that are made. *Reaves* v. *Dennis*, 6 Smed. & M., 89.

3. PRACTICE. *Inadvertence of counsel. Opportunity to supply evidence.*

The substantial rights of litigants should not be lost by the mere indiscretion of counsel when discovered during the progress of the trial, and

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Statement of the case.

application to avoid its effect is promptly made, which, if granted, will result in no delay or injustice to the opposite party. Where, because of failure to make certain proof, a demurrer to evidence is interposed, and plaintiff seasonably applies for leave to make the further proof, it is error to refuse the application and compel a joinder in the demurrer.

FROM the circuit court of Leflore county.

HON. R. W. WILLIAMSON, Judge.

On September 17, 1891, Flash, Preston & Co., in New Orleans, La., drew a bill of exchange on T. C. Garrott, of Minter City, Miss., payable at the office of Chaffe, Powell & West, in New Orleans, December following. It was accepted by Garrott; and it seems that the appellant, Holmes, indorsed his name on the back thereof, but when, or for what consideration, does not appear.

Appellees brought suit on the bill against Garrott, as acceptor, and Holmes, as indorser. The declaration alleges that Garrott was indebted to plaintiffs, and, in consideration thereof, accepted the bill; that Holmes, for a valuable consideration, indorsed it; that it was duly presented, and was protested for non-payment, whereby defendants became liable to pay, etc. It does not aver that notice of dishonor was given to Holmes.

Defendants pleaded the general issue and set-off, and Holmes filed an additional plea that his indorsement was without consideration. To this latter plea plaintiffs replied that Holmes indorsed the bill at the time it was accepted by Garrott, as additional security.

On the trial, plaintiffs introduced in evidence only the bill of exchange and a notarial certificate showing protest thereof for non-payment and notice to plaintiffs. Defendants demurred to the evidence, whereupon plaintiffs asked leave of the court to introduce further proof, which was refused, and they excepted.

Issue being joined on the demurrer, the same was overruled, and plaintiffs had judgment, from which the defendant, Holmes, appealed.

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Southworth & Stevens, for appellant.

The judgment must be reversed because of the failure to show notice of dishonor as to the indorser, Holmes, who was only secondarily liable. 2 Daniels on Neg. Inst., § 970; Tied. on Com. Paper, § 336; 3 Randolph on Com. Paper, 1239.

Plaintiff must show notice affirmatively. Tied., § 348; *Insurance Company* v. *Emerson*, 4 Smed. & M., 177. And the proof must be clear and satisfactory. *Downs* v. *Bank*, 1 *Ib.*, 261.

S. R. Coleman, on the same side.

If the rule announced in *Stiles* v. *Inman*, 55 Miss., 469, is the law, judgment should have been in favor of appellant.

Rush & Gardner, for appellees.

The declaration does not charge that notice of protest was given. There was no demurrer, and it was sufficient to uphold the verdict. It was not necessary to prove more than was alleged in the declaration. Appellant could waive notice, and this he did by not objecting to the declaration.

The acceptor is a party primarily liable, and, as to him, no notice was necessary. Tied. on Com. Paper, §§ 209, 334.

The fact that the record does not show that the notary gave notice, does not make it certain that appellant was not in fact notified. If he received notice from plaintiffs, that was sufficient. It will be presumed that the notary did his duty as to this; but, if not, it is too late for appellant to complain. The declaration and the draft and protest make a *prima facie* case, and there was no proof to overcome it.

COOPER, J., delivered the opinion of the court.

While we would have preferred the rule that the liability of an irregular indorser of a negotiable instrument was *prima facie* that of a co promisor with the party primarily bound, we are precluded from adopting it by former decisions of this court.

In the case of *Thomas* v. *Jennings*, 5 S. & M., 630, reported also on another appeal in *Jennings* v. *Thomas*, 7 S. & M., 617,

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the rule was declared that the liability of such party was determinable by the nature of the transaction, which must be proved by evidence other than that afforded by the instrument itself. In other words, that a defendant, not connected with a promissory note or bill of exchange otherwise than by such irregular indorsement, may be charged as maker, acceptor, indorser or guarantor, as the evidence may disclose his contract to have been, and that the instrument alone is not sufficient evidence to charge him in either capacity.

In *Polkinghorne* v. *Hendricks*, 61 Miss., 366, it is decided that one who, by irregular indorsement, by writing his name on the back of a negotiable instrument, before its delivery, for the purpose of giving credit to the party primarily liable thereon, becomes liable as a co-promisor with such person.

Under the decisions in *Thomas* v. *Jennings*, the evidence of the plaintiffs, which consisted only of the bill of exchange and its protest, was insufficient to uphold a verdict against the appellant, Holmes.

But the appellees contend that, since the facts set out in the declaration are supported by the evidence, the defendant has lost all right to object to their sufficiency by failing to demur to the declaration; that a judgment in their favor on a demurrer to the evidence is to be considered just as the verdict of the jury would have been, and that the defect is cured by the judgment of the court on the demurrer, by that provision of the statute of jeofails, which declares that "no judgment shall be stayed or reversed, after verdict, . . . from any mispleading, insufficient pleading, . . . or for omitting the averment of any matter without proving which the jury ought not to have given such verdict." Code 1892, § 746.

This contention by appellees is upon the assumption that the defect of evidence goes only to the extent of a failure to prove that notice was given to appellant of the dishonor of the bill; and the argument is, that, since the declaration did not aver such notice, the appellant, by failing to demur

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to the declaration, waived the defense of want of notice. There are two replies to this. The first is that, under the rule announced in *Thomas* v. *Jennings*, the mere production of the note was insufficient to fix any liability upon Holmes. The second is that the statute of jeofails cures only defects of pleading, and not those of proof.

If a defectively stated case is well proved, the verdict cures the defect of the pleading, and so, after verdict, nothing to the contrary appearing in the record, it would be presumed that a case was proved entitling the successful plaintiff to the verdict secured; but when the evidence is made a part of the record by a demurrer thereto, or by general bill of exceptions upon motion for a new trial overruled, the court must find sufficient evidence to support the judgment or verdict before it can be permitted to stand. A defectively stated cause of action cannot occupy a stronger position than one correctly averred, and a verdict under either must find support in the evidence. *Reaves* v. *Dennis*, 6 S. & M., 89.

The judgment on the demurrer should have been for the defendant, but to render that judgment here would be to preclude the plaintiffs from the opportunity of making out their case. They seasonably applied to the court for leave to make further proof, which was denied them, and they were forced to join in the demurrer. Since the judgment of the court below was in their favor, they cannot now assign error of the action of the court in refusing them leave to supply the defect of evidence. This the court should have permitted to be done. The substantial rights of litigants should not be lost by reason of the mere slip or inadvertence of counsel when discovered during the progress of the trial, and application to avoid its effect is promptly made, which, if granted, would result in no delay or injustice to the adversary party. The plaintiffs are not entitled to retain the judgment they have secured, but, to preserve the rights of both parties, we will reverse the judgment, discharge the demurrer to the evidence, and remand the cause.

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Syllabus.

H. W. FOOTE v. M. C. HAMBRICK.

1. CHANCERY PLEADING. *Inconsistent averments. Case.*

A bill to foreclose a mortgage, executed by a husband and wife, alleged that, by mistake, the deed embraced land not owned by the grantors, and that the husband altered the mortgage after its delivery by inserting the land intended; and further alleged "that the whole transaction was between the complainant and the husband acting for himself and wife, except that the wife executed the papers after they were prepared." *Held*, on demurrer by the wife, in the absence of any averment of ratification, that this exception, embracing the all-important step of the transaction, negatives the main allegation as to the husband's agency in the whole transaction.

2. SAME. *Alternative and inconsistent averments. Case.*

The bill further alleged "that the defendant was either informed by her husband of the mistake, and its correction by him, and acquiesced therein, or she never had any information that any mistake had been made," etc. *Held*, that this alternative averment, which must be taken as true on demurrer, excludes all idea of acquiescence in the alteration, since she could not acquiesce in that of which she had no knowledge.

3. ALTERATION OF DEED. *Intent to correct mistake.*

The alteration by the mortgagee of the description of land in a mortgage, without the consent of the mortgagor, will not render the mortgage void, if done without any fraudulent intent, but only in the honest effort to correct a mistake, and conform it to the true intent. *McRaven* v. *Crisler*, 53 Miss., 542.

4. UNAUTHORIZED ALTERATION. *Mistake. Description.*

Where a husband, having, jointly with his wife, executed a mortgage intended to include their homestead, and afterwards, without authority from her, but, in an honest effort to correct a mistake, inserted the homestead which had been omitted from the description, the mortgage, though not rendered invalid as to the other lands, is inoperative as to the homestead. As to this, the deed is not her act.

FROM the chancery court of Noxubee county.
HON. T. B. GRAHAM, Chancellor.

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Brief for appellant.

Bill in chancery to foreclose a trust-deed. The facts are stated in the opinion. It may be added that the bill, while alleging a mistake in the description of the land intended to be embraced in the trust-deed, contains no prayer for a reformation thereof, or for general relief.

Rives & Rives, for appellant.

The tendency of courts now is to uphold and enforce contracts of all kinds according to the intention of the parties. Liberality has taken the place of strictness. *Collins* v. *Collins*, 51 Miss., 311.

Even if the alteration were unauthorized or contrary to the original agreement, it would not render the whole mortgage void, since it was not fraudulently made, but in good faith. *Collins* v. *Collins*, *supra*; *Vanhorn* v. *Bell*, 79 Am. Dec., 506. The case is governed by *McRaven* v. *Crisler*, 53 Miss., 542.

This mortgage, having been executed since the code of 1880 removed all disabilities of coverture, it is subject to be corrected so as to evidence the true intent of Mrs. Hambrick. Equity can correct the instrument, and the parties can do that which equity will compel to be done.

The correction must be construed as her act, in view of the allegations of the bill. *Ross* v. *Baldwin*, 65 Miss., 575.

H. W. Foote, appellant, *pro se*, on the same side.

A ratification may be by parol, and may be implied. It is a question of fact. 7 Yer. (Tenn.), 410; 58 Ill., 19; 19 Johns., 391; 10 Am. Dec., 239; 35 Ark., 147; 123 Mass., 297; 40 Mich., 348; 9 Smed. & M., 375.

An alteration, honestly made, to correct a mistake will not avoid an instrument. *McRaven* v. *Crisler*, 53 Miss., 542. See 14 Am. Rep., 766, and cases cited. At most, it could only be void as to the part altered. 51 Miss., 311.

Parties who have consented to an alteration, or ratified it, cannot withdraw from such consent or ratification. 33 Ark., 225.

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Brief for appellee.

A. C. Fant, for appellee.

The alteration of the mortgage without the consent of Mrs. Hambrick annulled it. Bishop, Contr., § 746; 5 Lawson, R., R. & P., § 2474; 1 Jones, Mortgages, § 94; 7 Am. & Eng. Enc. L., 502, 509; *Everman* v. *Robb*, 52 Miss., 653. *McRaven* v. *Crisler* is contrary to these authorities, and should not be followed.

A. C. Bogle, on the same side.

The bill does not seek reformation of the trust-deed, nor does it pray for general relief. It must therefore be considered as a mere bill to enforce the trust-deed as altered.

It is well settled that the holder of any instrument, who, without consent of the maker, materially alters it to his advantage, cannot enforce it. It is no answer to this to say that courts of equity can reform the instrument. Courts are organized to do such things, and the policy of the law is that only the courts shall do them.

The bill does not show that the wife promised to include the homestead, or supposed it was included at the time she executed the trust-deed. The general allegation that all parties intended to include the homestead, is destroyed by the specific averment that the whole transaction was with the husband, and all the wife had to do with it was to execute the papers.

The good faith of the party making the alteration does not alter the case. It is a question of public policy, not intent.

It cannot be said that appellee ever acquiesced in the alteration, since the bill avers that she never knew of it. *McRaven* v. *Crisler* is not decisive of this case. In that case the alteration was of a note, and in a matter not material to the note. See *Bridges* v. *Winters*, 42 Miss., 135. The case is entirely different where deeds to land are altered, especially when the homestead is inserted. As to that, a conveyance can have no effect without the signature and acknowledgment of the wife.

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T. W. Brame, on the same side.

That a material alteration of a note, without the maker's consent, discharges him, was decided in *Oakey* v. *Wilcox*, 3 How., 330. This case has never been overruled. *Bridges* v. *Winters* and *McRaven* v. *Crisler* are not in point. They were cases of simple notes, and the alterations were not in essential matters. So of the case of *Collins* v. *Collins*. The doctrine of these cases cannot extend to conveyances of land, where the alteration is material.

The wife is not bound by the unauthorized act of the husband in making the alteration. 1 Jones on Mort., 94; 5 Lans., 365.

This is not a bill for reformation, but a suit on the altered instrument. In any view of the case, the mortgage is void as to the homestead. That can be transmitted only in the manner provided by the statute.

Argued orally by *J. E. Rives*, for appellant, and *A. C. Bogle* and *T. W. Brame*, for appellee.

WOODS, J., delivered the opinion of the court.

The material facts shown by the appellant's original bill, and admitted by the demurrer of the appellee, are these, viz.: The appellee and her husband, J. T. L. Hambrick, being indebted to appellant in the sum of $6,973.95, agreed to give him their note for that amount, and to secure the payment thereof by a trust-deed in his favor on certain lands in Noxubee county, including the north-east one-fourth and thirty acres off the east side of the north-west one-fourth of section 17, township 16, range 19; and they accordingly made and delivered to appellant their promissory note for said sum, due December 1, 1891, executing, at the same time, to Thomas Foote, as trustee, their deed of trust, to secure the payment of the said note, intending to include in the trust-deed the land, and only the land, fully and particularly set out and described in the bill, in which is included the said north-

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east one-fourth and the thirty acres in the north-west one-fourth of said section 17; but that, by mistake in drafting the trust-deed, the *south*-east one-fourth, and thirty acres off the east side of the *south*-west one-fourth, of said section 17 were inserted, instead of the north-east one-fourth, and thirty acres off the east side of the north-west one-fourth of said section as was intended. Neither the appellee nor her husband owned any land in the south-east one-fourth or the south-west one-fourth of said section 17; but appellee did, at that time, own the north-east one-fourth, and thirty acres off the east side of the north-west one-fourth, of said section, and these lands in the north-east one-fourth and the north-west one-fourth were intended by all the parties at the time to be included in said trust-deed, together with the other lands described in the bill, and correctly embraced and set out in the deed, and appellee understood that all of the lands described in the bill of complaint were included in the trust-deed. Some time after the execution of the trust-deed, complainant and the husband of appellee, one of the makers of the note and trust-deed, had a conference touching the matter, and he agreed to the correction of the trust-deed, and the said husband of appellee took the deed, and, in the presence of complainant, erased the letter "S," in "S. E. one-fourth" of section 17, and wrote the letter "N" in place of the erased letter "S," and did the same with the letter "S" in the "S. W. one-fourth" of section 17, so that said deed then, as it was first intended it should, embraced all the lands described in the bill filed herein, and said trust-deed was itself filed as an exhibit to the bill. The said north-east one-fourth, and the thirty acres off the east side of the north-west one-fourth, of section 17 embraced the homestead of said appellee and her said husband, and the appellee was either informed by her husband of the mistake which had been made, and of its correction by him, as set out and shown in the bill, and acquiesced therein, or she never had any information that any mistake had been made, but supposed all

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the time that the trust-deed included and described the said north-east one-fourth, and the thirty acres in the north-west one-fourth, of said section 17, the land which she really owned, and which embraced her homestead; and appellee, as late as December 3, 1891, in a letter written to appellant, admitted that the deed embraced her homestead, and that appellant could lawfully proceed to have the same sold. The whole of said promissory note, principal and interest, remains due and unpaid, and appellee refuses to pay the same, or any part thereof, and Thomas Foote, the trustee, and J. T. L. Hambrick, appellee's husband, are now dead.

The prayer of the bill is for a decree of the court for a sale of all, or of a sufficiency of the lands embraced in the trust-deed, as corrected, for the satisfaction of the appellant's debt.

To this bill appellee interposed her demurrer, assigning, among other causes, as the second ground, that the alteration of the trust-deed, as averred and set out in the bill, rendered the same void, and destroyed all rights which appellant had thereunder. The demurrer was by the court below sustained, and the bill dismissed, the appellant declining to amend; and from this action an appeal is taken.

Before proceeding to consider the proposition thus presented, it is necessary for us to dispose of two contentions, relied upon by counsel for appellant as conclusive of the controversy, and as obviating any requirement on our part to determine the legal question raised by the second ground of demurrer.

1. It is said for appellant that it sufficiently appears from the statements of the bill that J. T. L. Hambrick, the husband of appellee, was the agent of his wife in this entire transaction, and was authorized to make such alteration and correction of the trust-deed. This contention rests upon an erroneous view of the meaning and effect of the averment of the bill, "that the whole transaction was between complainant [appellant] and said J. T. L. Hambrick, acting for himself and his wife, except that defendant [appellee] executed the

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papers after they were prepared," etc. The exception utterly negatives all thought that Hambrick had any sort of agency from the wife when the final step in the negotiations had been reached, and the consummation of the agreement arrived at by the negotiations was to be executed. When the final and all-important act of making the conveyance contemplated by appellant and J. T. L. Hambrick in their preliminary negotiations was to be performed, the appellee appeared in person and executed the deed. In this act there was no agency, for she represented herself and acted for herself. That there was ever any subsequent authorization of the husband, in any respect, is not averred in the bill.

2. It is insisted further, however, by counsel for appellant, that the bill shows acquiescence—that is, assent—subsequent, on appellee's part, to the alteration and correction of the deed made by her husband. This contention rests upon the averment of the bill, "that said defendant [appellee] was either informed by her husband of the mistake that had been made, and that had been corrected by him as aforesaid, and acquiesced in said correction, or she never had any information that any mistake had been made, but supposed all the time that the said deed of trust embraced and included said N. E. ¼ and 30 acres off the east side of the N. W. ¼ of said section 17," etc.; and upon another averment of the bill, to wit; "that as late as December 3, 1891, said defendant in a letter to complainant admitted that said deed of trust embraced her homestead, and that complainant could lawfully proceed to have it sold."

If the first averment, to the effect that appellee was informed by her husband of the correction and alteration of the deed, and acquiesced therein, had gone no further, and had not been burdened with its alternative statement—which appellee is entitled to take as true against him—to the effect that appellee never knew of the alteration and correction made by her husband, there would be ground for the contention. But the alternative averment that appellee never

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knew of the alteration, but always supposed the N. E. ¼ and the 30 acres in the N. W. ¼ were embraced in the deed, is so palbably in conflict with the idea of consent to alteration on her part as to leave no place for controversy. It is vain to try to imagine consent to that of which the supposed consenting party has no knowledge. Nor is this contention given any support by the other averment of the bill, on which reliance is placed by appellant's counsel, to the effect that in her letter of December 3, 1891, appellee admitted that the deed embraced her homestead, and that appellant could lawfully proceed to have it sold. This averment is altogether consistent with the alternative statement contained in the former averment which we have examined. If appellee supposed, all the time, that her homestead was embraced in the deed as originally drawn, the letter is but the reasonable expression of her understanding of the extent of the incumbrance upon her estate, and of the rights of appellant under such incumbrance. But, that acquiescence—consent of appellee to the correction and alteration—is predicable of any thing, or every thing, said to have been admitted in her letter, is not maintainable.

We now come to the examination and determination of the chief question made by the record before us, and which is, fairly stated: Does the alteration of the trust-deed, in a material matter, by one of the grantors, after its execution and delivery, and while in the custody of the beneficiary, and with his privity, without the knowledge and consent of the other grantor, whereby an advantage is conferred upon the beneficiary, render the deed absolutely void, though the alteration was made in good faith, in an honest effort to correct a mistake, and to conform the instrument to the real intention of all the parties at the time of its execution?

The courts in England and the United States which have answered this question affirmatively, holding that any alteration of a deed, bond, bill or note, when made by the voluntary act of the creditor, to his advantage, and whereby the

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responsibility of the debtor bound is enlarged or injuriously affected, no matter what the motive with which the alteration is made, destroys the instrument altered, declare that the principle or rule is founded, (1) in public policy, to protect debtors who have, in writing, bound themselves in a particular manner, and for a certain object, from acts hurtful to them and hard to be guarded against, and done in their absence and without their consent, it being thought that to permit such alterations would destroy the value of written contracts by opening the door to endless frauds and perjuries; and (2) for the reason that no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected.

It is impossible to yield the assent of the mind to the first ground on which the rule is supposed to be founded, for to do so would be, in effect, to say that no written instrument shall ever be made to correspond to and effectuate the real contract between the parties by extrinsic evidence; that the naked letter of the written contract, though mistakenly drawn, shall not be shown by any parol proof not to embody the true agreement between the parties. To refuse to listen to parol evidence, to ascertain whether the written instrument embodied the agreement of the parties, or through mistake, wilfully or inadvertently made, failed to do so, would indeed shut the door against the possibility of fraud and perjury by one of the parties, but it would at the same time open it wide to fraud and knavery on the other side. The proper protection of debtors who have bound themselves in writing, will be best secured, not by absolving them from obligations which they have assumed, or continuing them in properties which they have agreed to part with for valuable considerations, but by ascertaining what is the truth, and compelling observance of that by all parties.

The second reason advanced in support of the rule appears to us equally unsound, for it assumes that any alteration of an instrument, under any circumstances, is fraudulent. But

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to talk of "permitting a man to take the chance of committing a fraud, without running any risk of losing by the event when it is detected," in a clear case of an alteration, even in a material part of the instrument, made in good faith to carry out the admitted intention of the parties, though done under a mistake as to the propriety or efficacy of such act, is a perversion of terms, and an abandonment of the proposition under consideration. Of course, if, to secure an advantage, a fraud is committed whereby the responsibility of the person sought to be charged is increased, the instrument will be avoided, for fraud vitiates every thing tainted by it. Even this wholesome rule sometimes operates hardly; but to extend the doctrine, and deny access to the courts to those who have innocently and honestly sought, erroneously, to correct a confessed mistake in the written instrument, would be harsh and inequitable, indeed. The public welfare requires the infliction of punishments for crimes; and, for offenses against individual rights, conceived in knavery and brought forth in fraud, the transgressor is made to realize the hardness of his way, by a refusal of the law to yield him any aid in attempting to take any thing under his fraud-infected instrument; but we cannot bring ourselves to consent that an honest mistake made by a party to a contract to conform the instrument to the real agreement, in order to carry out the true intention of all the parties, should utterly destroy the validity of the writing, and so visit upon the innocent, though mistaken, party to the attempt at conformation, the confiscation of all the property or estate involved, and that, not for the benefit of the state, but for the other party to the contract—a person whose real agreement and intention originally was to be bound exactly as the offending party innocently, but mistakenly, sought to show he was bound by making the writing speak the real truth.

When we come, too, to carefully examine the authorities holding to this harsh and unjust rule, we shall find in their inharmonious and inconsistent utterances that, while pro-

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fessing adherence to the principle, the application of it is constantly avoided by endless exceptions and limitations. The sturdy adherence of courts in England and America to the rule in theory is in bewildering contrast with the practical nullification of it in concrete application to innocent but mistaken offenders, by the same courts.

This rule, as announced in *Pigot's Case*, 11 Coke, is as follows: "When any deed is altered in a point material, by the plaintiff himself or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line or through the middle of any material word, that the deed thereby becomes void." And while the long subsequent English cases, as well as the American cases which follow, and are founded upon the authority of this ruling by Coke, all point to *Pigot's Case* as the source of their inspiration, that half of the ruling relating to alterations made by strangers is not now given credit by any court in the United States, and, as to the other half of the rule relating to alterations by the obligee, the courts of both countries are industrious to, and successful in, finding some exception or modification or limitation by which to save the unwary who have, mistakenly, but not fraudulently, undertaken to correct admitted mistakes in the contract as originally drawn.

In *Kershaw* v. *Cox*, 3 Espinasse, 246, suit was brought on a bill of exchange, drawn by Collier & Son in favor of Cox, the defendant in the suit, and indorsed by Cox and delivered to Kershaw, son of one of the plaintiffs, and he, being indebted to plaintiffs, remitted the bill to them in payment of his debt. The day following, the bill was sent back by plaintiffs, on discovering that the words "or order" were wanting, so that it could not be negotiated by indorsement. On receiving it back, Kershaw, the son, applied to the defendant and indorser, who referred him to Collier, the drawer, who inserted the words "or order," giving negotiability to the bill. On trial it was contended for

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defendant that, without defendant's consent, there had been a material alteration by the insertion of the words "or order;" but the contention was disallowed, Mr. Justice LeBlanc intimating an implied assent to the alteration by defendant, and expressly saying that the alteration was not in a material part. And yet, in the later case of *Knill* v. *Williams*, 10 East, 453, which was a suit on a promissory note, originally expressed to be "for value received," but altered the next day, not in pursuance of the original intention of the parties, by consent, by adding the words "for the good will of the lease and trade of Mr. F. Knill, deceased," Mr. Justice LeBlanc strangely enough says, in response to suggestion of counsel that this case fell within the rule as applied in *Kershaw* v. *Cox:* "The opinion which I delivered in *Kershaw* v. *Cox* can only be supported on the ground that the alteration, then made in the bill the day after it was negotiated, was merely the correction of a mistake made by the drawer of it, in having omitted the words 'or order,' which it was intended, at the time, should be inserted; *for the alteration there made was a very material one.*" When *Kershaw* v. *Cox* was on trial, the alteration was *immaterial*, and did not avoid the bill. In the subsequent case of *Knill* v. *Williams*, after Kershaw had been safely delivered from the pit digged by the lord chief justice in *Pigot's Case*, the alteration appeared, to the same judge, *very material.* The court held to the rule in the abstract, but refused its application in the concrete.

In *Brutt* v. *Picard*, 1 Ryan & Moody, 37, which was a suit by the indorsee against the acceptor of a bill of exchange, Abbott, Lord C. J., said: "I shall leave it to the jury to decide whether this bill was not dated by mistake 1822. If they are of opinion that it was originally the intention of the parties to the bill that it should have been dated 1823, and that the figure 2 was inserted by mistake, I am of opinion that this alteration will not vacate the bill." In this case, though the alteration was in a material point, the date of the bill, yet the striking out of 2 and the inserting of 3 to make it con-

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form to the original intention of the parties, was held not to render void the bill. The correction of a mistake by a third person, to whom the bill was simply intrusted for delivery to the indorsee, was held not vitiate, whereby Brutt was saved the wretched consequences that would have followed the adherence of the court in the concrete to the rule in *Pigot's Case*. In view of these applications of the rule in England, we may well join Lord Abinger in saying, in his opinion in *Hutchins* v. *Scott*, 2 M. & W., 809: "The old law was, no doubt, much more strict than it has been in modern times."

In many of the American cases professing to stand by that part of the inequitable old rule which renders void an instrument altered, without regard to the motives of the person making the alteration, we find like evidence of the practical abandonment of the doctrine, in cases of mere mistake—where fraud cannot be affirmed. In support of this remark, and to avoid the undue extension of this opinion by protracted examination in detail, we quote from Parsons on Notes and Bills, vol. 2, pp. 568, 569: "Words which the law would annul or supply may be added to a note or bill, and constitute no material alteration; for it would be unworthy of the wisdom of the law to decide that an incautious interlineation of a word, which the same law would necessarily imply, should defeat the contract. . . . *Mistakes* in a note or bill may be corrected, and the alteration will not vitiate; the principle and reason being quite analogous to those stated in the preceding paragraph. The insertion of words or figures which have been left out by mistake is no defense."

It must be conceded, however, nearly all text-writers, and the majority of the courts of last resort in the United States, yet assert the correctness, in a general way, of the harsh rule we have been considering. But we find excellent authority for the juster and more equitable rule, which we have foreshadowed—that an alteration innocently made, without improper motive, to conform the instrument to the intention of the parties at the time of its execution will not avoid it. In

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Bowers v. *Jewell*, 2 N. H., 543, the court says: "Although, then, it may not be too vigorous to hold that any alteration affecting the evidence to be offered on trial is material, yet it is reasonable and just to permit a party to show that the alteration was by consent of those interested, was by accident, or under circumstances rebutting every presumption of improper motives. . . . So, the intent must be fraudulent; or, in other words, the act done with an eye to gaining an advantage." And in the very recent case of *Croswell* v. *Labree*, 81 Me., 44, it is said by the court: "The defense at the trial was an alleged unauthorized alteration of the note by inserting in it the words 'or bearer.' The judge at the trial ruled that if the alteration, though unauthorized, was innocently made, without any fraudulent or improper motive, it would not avoid the note. That was correct, and is well borne out by the principle established in *Milberry* v. *Storer*, 75 Me., 89. . . . The alteration in the present instance was a material one. It undertook to foist a contract on the maker not made by him. It changed the obligation as an instrument of evidence." And to the like effect are other causes determined in the supreme court of Maine, beginning as early as 1839, in 3 Shepley, 357.

In *Russell* v. *Reed*, 36 Minn., 376, we find this satisfactory statement of the rule of law: "But the unauthorized and material alteration of a mortgage by the mortgagee, or with his privity, after execution, unexplained, is presumptively fraudulent, and vitiates the contract."

The like enlightened ruling was made by the supreme court of Massachusetts, in the case of *Adams* v. *Frye*, 3 Met., 103. Said Dewey, J., in delivering the opinion of the court: "The court are of opinion that the rule of law applicable to the case before us may be properly stated as follows: (1) That if the obligee of an unattested bond, after the execution and delivery thereof, shall, without the knowledge and assent of the obligor, fraudulently, and with a view to gain some improper advantage thereby, procure a person who was not

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present at the execution of the bond, to sign his name as an attesting witness, such act will avoid the bond and discharge the obligor from all liability on the same; (2) that the act of the obligee in procuring the signature of one as a witness who was not present at its execution, and not duly authorized to attest it, will, if unexplained, be *prima facie* sufficient to authorize the jury to infer the fraudulent intent; but that it is competent for such obligee to rebut such inference, and, if the act be shown to have been done without any fraudulent purpose, the bond will not be avoided by such alteration."

In harmony with this general view is the opinion of the court in *Vogle* v. *Ripper*, 34 Ill., 100.

Without pursuing the examination further, it remains to be said that the modern and liberal rule has been adopted in this state, in the case of *McRaven* v. *Crisler*, 53 Miss., in language so forcible and unambiguous as to forever put an end to controversy in our midst. It was well said by Chalmers, J., in that case: "But, even if it be deemed a material alteration, we think it is equally clear that it did not vitiate the note. It was but the correction of a mistake, so as to conform the note to the intention of both the parties to it, and it was made in such manner as clearly to negative any fraud upon the part of the payee, or any intention to obtain an advantage. That under these circumstances alterations in notes will not vitiate them, we think is well settled."

An exhaustive examination of this question, with careful and protracted consideration of the subject as again presented in the case at bar, confirms us in the wisdom and justice of the former opinion of this court in the case just cited, and we decline to depart from it.

In response to the suggestion of counsel, we have only to add that the rule is applicable to alterations in deeds, bonds, notes and bills alike. There is no contrariety of opinion on this point in all the numerous authorities examined by us. Indeed, it is held that there is greater reason for the rule in

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cases of notes than in those of deeds, because of their negotiability and the consequent increase of danger from alterations.

The act of alteration in the case before us, it is hardly necessary to say, is nugatory and inoperative, whereby the lands constituting the homestead were inserted. As to these, the deed is not the act of appellee. But for that unauthorized act, the deed, as to all the other lands, is held by us not to be avoided, and that the demurrer should have been overruled.

Decree reversed, demurrer overruled and leave to answer given within thirty days after mandate filed.

J. H. ODENEAL ET AL. *v.* W. M. HENRY.

1. CONTRACT OF SERVICE. *Discharge of employe. Other employment. Burden of proof.*

In an action by an employe wrongfully discharged, to recover of his employer, as damages, the balance of the contract-price for the unexpired term of his employment, the burden of proof is on the defendant, if he defends upon the ground that plaintiff had, or could have had, other employment, and neglected to secure it.

2. CONTRACT. *Written proposal and acceptance. Oral evidence.*

Where plaintiff's letter to defendant proposing to enter his service on certain clearly specified terms, and the defendant's letter in reply accepting the offer, are in evidence and not disputed, it is error to refuse an instruction that these constitute the contract, notwithstanding plaintiff has sworn that the contract was an oral one, made prior to the date of the letters.

3. DISCHARGE OF EMPLOYE. *Reasons assigned. Instruction.*

Where defendant, having previously expressed dissatisfaction with plaintiff as manager of his dairy farm, wrote him a letter discharging him, assigning some reasons, but also expressing generally his dissatisfaction, and refusing to go into details, and, when sued, produced evidence to justify the discharge on other grounds, an instruction is improper which

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tells the jury that the reasons stated in the letter do not justify the discharge. Thus to single out and pronounce upon the evidence disconnected from other facts, is erroneous, as being calculated to mislead the jury.

4. SAME. *Reasons for discharge. Knowledge of employer.*

If at the time of the discharge of an employe, sufficient grounds therefor actually existed, the employer is not liable in damages therefor, although he did not know of them at the time of the discharge, and may have assigned other reasons.

FROM the circuit court of the first district of Hinds county.

HON. J. B. CHRISMAN, Judge.

Appellee, Henry, brought this action December 9, 1891, against J. H. Odeneal and Anna M. Odeneal, claiming $1,331.50 damages for the non-performance of an alleged contract of hiring. The declaration alleged that on the twenty-fourth day of December, 1889, defendants contracted with plaintiff to take charge of and manage their stock-farm and dairy, near Jackson, for a period of one year, at a monthly salary of $60, to be paid in money, and, in addition, that they were to be allowed the use of a house and garden, and such dairy products as he might need for himself and family—these perquisites alleged by plaintiff to be worth $40 per month; that in November, 1890, this contract was renewed by defendants for another year, beginning December 24, 1890; that plaintiff continued faithfully to discharge his duties until about March 24, 1891, when he was discharged without cause; that he made reasonable effort to obtain employment about Jackson and elsewhere, without success, until about December 1, 1891, when he obtained unremunerative employment. Plaintiff claims as damages the full amount of salary and alleged value of the perquisites during the two years, less the amounts received.

In view of the opinion, it is not necessary to set out the course of the pleadings, or to advert to the many points having reference to the court's rulings thereon.

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On the trial, the plaintiff testified that the contract, as mentioned in the declaration, was orally made with defendant, J. H. Odeneal; that he and Odeneal discussed the whole matter, and that plaintiff made him a verbal proposition, which Odeneal, after consideration for a few days, accepted by a letter, dated December 12, 1889. It was contended by defendants that the contract was evidenced by a letter from Henry to Odeneal, dated December 11, 1889, and the above-mentioned letter of Odeneal in reply. The letters were produced, and their identity not questioned. The letter to Odeneal was as follows:

"OSBORN, MISS., December 11, 1889.

"*Mr. J. H. Odeneal, Jackson, Miss.:*

"DEAR SIR—Yours of tenth has been received and carefully noted, and, in reply, I would say that I could not accept of your proposition. I am willing to take $600, and buy or pay for the use of the dairy. The expense of moving my furniture will be very heavy to start with. I will give my undivided attention to the business for the above-named price. You will please let me hear from you by return mail, as there are others waiting on me, but would prefer living with you. Respectfully,

"W. M. HENRY."

Odeneal received this on the day following, and at once answered, under date of December 12, 1891, accepting his proposition, in the following words: "Yours of eleventh inst. is received. I will accept your proposition."

After the introduction of these letters, which contradicted the testimony of plaintiff, that the contract was verbal and its terms different from those mentioned in the letters, he was asked if he had any explanation to offer about the matter, and he replied in the negative, and the contradiction was not explained.

There was evidence that plaintiff, after being discharged,

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sought other employment, in Jackson, without success, and, in a few weeks, moved to another state; but what efforts he there made to secure employment, and when he did, in fact, find work, are not shown by any evidence.

Early in the year 1891 Odeneal became dissatisfied with Henry's management, and so informed him, but nothing definite was done until February 17, 1891, when Odeneal wrote plaintiff a letter, the material parts of which were that he was not satisfied with plaintiff's management; that he disliked to make a change at that season, but that plaintiff ought to be looking out for other business; that he had confidence in plaintiff's integrity, and felt satisfied he had done the best he could, but that the results were very unsatisfactory, and it was necessary to cut down expenses, and get a cheaper manager.

Shortly after the receipt of this letter, and as a consequence of it, Henry left the farm, another manager having been employed.

The evidence for plaintiff tended to show that he had attended to all his duties faithfully, and that there was no cause for his discharge; but there was evidence for defendants which tended to show that he was inattentive and unkind to the stock on the farm, at times maltreating them; and also that he had, about the time of his discharge, altered certain entries and made erasures of certain figures on his cash-book, the effect of which would be to falsify his account of the receipts from the farm, and diminish the balance due defendants.

Among other instructions given for plaintiff, were the following:

"2. If the jury believe from the evidence that the letter written by the plaintiff to defendant, dated December 11, 1889, and the letter from Odeneal to plaintiff, dated December 12, 1889, constituted the contract between the parties, then it was a contract from year to year, or by the year.

"5. If the jury believe from the evidence that the defend-

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ant employed plaintiff by the year from December 24, 1890, and that the plaintiff was discharged before the expiration of the year for the reasons set forth in the letter of J. H. Odeneal to the plaintiff, dated February 17, 1891, then the jury is instructed that these reasons do not constitute good and sufficient cause for discharging the plaintiff."

Defendants asked for an instruction in these words:

"3. The contract between the plaintiff and defendants did not entitle plaintiff to $60 a month, nor to the use, free of charge, for his family, of the dairy products of the farm."

But the court refused it in this form, and gave it after prefacing it with the words: "If the jury believe from the evidence that the letters between the parties of the eleventh and twelfth of December embody the contract."

The court refused the eighth instruction asked by defendants, which was to the effect that the above-mentioned two letters constituted the contract, presumably basing such refusal on the fact that plaintiff had testified that the contract was a verbal one, and that this raised a question of fact for the jury.

The seventh instruction, as asked by defendants, was as follows:

"7. If the jury believe from the evidence that good and sufficient reasons existed for discharging plaintiff, and that there were such reasons, independent of those mentioned in the letter of February 17, 1891, then the jury may consider the same as constituting cause for discharging plaintiff, if the cause was sufficient."

The court refused this instruction as asked, but modified it by making the first clause of it to read as follows: "If the jury believe from the evidence that *the defendant had* good and sufficient reasons *which* existed," etc.

The foregoing statement will suffice to illustrate the assignments of error passed upon in the opinion. There was a verdict for $442.28. Judgment accordingly, and, after motion for a new trial overruled, defendants appealed.

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Brief for appellee.

Brame & Alexander, for appellants.

1. Whatever the rule may be in other states, it is well settled in this state, that in seeking to recover damages in a case like this, the plaintiff must show diligence in looking for other employment. It is a suit for damages, and it devolves on plaintiff to show his damages. *Hunt* v. *Crane*, 33 Miss., 669; *Birdsong* v. *Ellis*, 62 *Ib.*, 418; Wood on Master & Servant, 241, 246.

2. Plaintiff's second instruction ought not to have been given. It leaves the *jury* to say whether the letters constituted the contract, whereas the court should have settled that question. The plaintiff did not deny the letters, but admitted that the letter from Odeneal closed the trade. That letter referred expressly to Henry's letter, and the two manifestly made the contract. Plaintiff's statement to the contrary is self-contradictory. But the jury may have believed him in making up the verdict, instead of following the written contract. For the same reason it was error to modify defendants' third instruction. The court cannot say that this was not prejudicial to defendants. *Solomon* v. *Compress Co.*, 69 Miss., 319.

3. Plaintiff's fifth instruction, which announced that the reasons for discharge given in the letter of February 17, 1891, were insufficient, was clearly on the weight of evidence, and was misleading.

4. By modifying defendants' seventh instruction, so that, instead of announcing that the discharge was lawful if good reasons therefor existed, the court, in effect, declared that defendants must have *had* reasons, and the jury was virtually told that no reasons could be considered good if unknown to Odeneal at the time of the discharge. That is not the law. It is only necessary that reasons *exist*. Wood on Master & Servant, § 119.

Mayes & Harris, for appellee.

The refusal of defendants' eighth instruction and modifica-

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tion of their third were proper. They assumed *as a fact* that the two letters embodied the contract. As a matter of fact, it may seem pretty plain that Odeneal was right on this point and Henry wrong, but Henry did not alter his testimony that the contract was made by a verbal proposition and Odeneal's letter. There was an issue of fact as to this.

The modification of defendants' seventh instruction was a mere verbal change. If reasons existed, defendants had them. Besides, as presented, it was covered by other instructions already obtained. Again, it went too far in allowing defendants to rely on any grounds for the discharge, although not having reference to the pleadings.

The instructions were liberal in favor of appellants.

Argued orally by *L. Brame* for appellants, and *J. B. Harris* for appellee.

WOODS, J., delivered the opinion of the court.

The appellants have no reason to complain of the first instruction given for appellee. Primarily, it was not incumbent on the appellee to satisfy the jury that he had made diligent effort to obtain employment and had failed. If, after his discharge, he had other employment, or, if he could have had, and failed or neglected to secure it, the appellants should have made the proper proofs. Such proof is defensive in its character, and goes to reduce damages assessable against the discharging employer. The burden of proof on this point was on the appellants, and if there was no evidence, as counsel for appellants assert, showing when, if ever, appellee secured other employment, the appellee must not be held to have failed in making out his case. He was only to be required to meet any state of case made by the appellants' evidence which showed that he had been in other employment during the period of the contract of service, or that he might have been. 2 Greenleaf on Evidence, § 261*a*; *Barker* v. *Insurance Co.*, 24 Wis., 630; *King & Graham* v. *Steiren*,

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44 Pa. St., 99; 61 N. Y., 371; Wood's Master & Servant, 238, and cases cited in notes 1 and 2.

The action of the court in giving appellee's second instruction, and in refusing appellants' third instruction, as asked, and in modifying the same, and in refusing the eighth instruction prayed by appellants was erroneous. The contract is clearly contained in appellee's letter of December 11, 1889, and the reply thereto and the acceptance of the terms of employment therein by J. H. Odeneal's letter of December 12, 1889. There was no question of fact as to what the contract was. True, the appellee had sworn that the contract was a verbal one, but his own letter of the eleventh of December, making a distinct proposition for service at $600 per annum, dairy products to be bought or paid for by appellee, and J. H. Odeneal's acceptance of this proposition by letter of next day, as requested in appellee's letter, embodied the contract between the parties. That correspondence brought the minds of the parties together, and the contract was created thereby. The verbal contract which the appellee attempts to establish antedated, by some indeterminate period of time, the written contract found in the two letters referred to, by the appellee's own evidence; and, if it ever had existence, which may well be doubted, it was merged and lost in the subsequent perfect contract in writing. These letters constituted the contract, and the court should have so instructed the jury. The court should further have instructed the jury that, under this contract, appellee was in no event entitled to receive more than $50 per month, less the dairy products consumed by him and his family; and, as these dairy products were shown by appellee to have been worth $10 per month, it is plain that, under the law, as given by the court, the jury was authorized to, and doubtless did, find against appellants the sum of $20 per month more than the written contract warranted.

It must not be forgotten that, by the reluctant evidence of the appellee, these two letters are perfectly shown to contain the contract between the parties; for, at the very close of his

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cross-examination, when his letter of the eleventh of December is produced and presented to him, he admitted that it was his letter, written by him and mailed to Odeneal, and that he declined the offer to make any explanation as to the letter, in view of the most extraordinary statements he had made as to the contract not being in writing. The contract was in writing, and the court should have construed it for the jury's guidance. The failure to do so not only may have been effectual in procuring the verdict, but it is reasonably certain that it did, in large measure, produce the result arrived at by the jury.

The fifth instruction given for appellee is open to criticism. We fear the jury may have been misled by it, in the terms employed. It pointed with marked emphasis to the insufficiency of the reasons for appellee's discharge contained in J. H. Odeneal's letter of February 17, 1891, and declared that the reasons given in that letter do not constitute good and sufficient cause for the discharge of the appellee. Some of the reasons for Odeneal's dissatisfaction with the result of appellee's conduct of the dairy are given, but Odeneal expressly declares that "it will do no good to go into the details" of his dissatisfaction. He had previously declared himself dissatisfied with appellee's management, but he did not there specify the grounds of his dissatisfaction of the management. He enters into the reasons for his discontent with the financial results at Sligo, under appellee's supervision, but there is no hint of any reason for the dissatisfaction with appellee's management of the farm, the herd of cattle and other stock. The letter, on its own face, shows that Odeneal uttered his dissatisfaction with appellee's management generally, and declined to go into details, to give reasons. The singling out of a particular piece of evidence, and presenting it prominently to the jury, dissociated from all the other proofs in the case, is apt to mislead, and we fear it may have done so here.

The seventh instruction for appellants should have been given as asked. It stated the principle of law applicable

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with clearness and accuracy. If good and sufficient reasons for appellee's discharge existed, the appellants may set them up on trial by way of defense, though they may not have known of them at the time of the discharge. It is of no importance whether the employer state the reasons for his action, in discharging, to the employe; it is of equally small concern whether he really had knowledge of the justifying reasons at the time of the discharge. The all-important question is, did good reason actually exist at the time of the discharge? If the employe has been unfaithful and disregardful of his duty under the contract, he may be discharged, and the employer may defend any action for breach of contract brought by the employe, because of his discharge, by showing good and sufficient causes for the discharge, though ignorant of any or all the facts when the discharge is made. The inquiry on trial is, had the employe been unfaithful at the time of his discharge? If yea, it would be remarkable, indeed, if he should be permitted in a court of justice to say; "True, I was unfaithful, and merited my discharge, but my employer did not then know of my unfaithfulness, and I must be recompensed in damages for my proper discharge, because of my employer's ignorace of my misconduct."

It is not easy to say what the views of the learned court were in interpolating the words complained of in this seventh instruction, unless we assume that the charge, as amended by the court, was designed to inform the jury that, at the time of appellee's discharge, the appellants must have had knowledge of the reasons which would justify their action. If it does not mean this, then the amendments were useless and misleading, for the instruction, as asked, correctly stated that it was the naked existence of good and sufficient reasons which would justify the appellants in discharging appellee. This is the rule as laid down in Addison on Contracts, and in Wood's Law of Master & Servant, and, as seems, accepted generally.

Reversed and remanded.

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W. H. TRIBETTE ET AL. v. ILLINOIS CENTRAL RAILROAD CO.

1. CHANCERY JURISDICTION. *Multiplicity. Community of interest. Legal demands.*

The jurisdiction of equity to prevent a multiplicity of suits does not extend to enjoining a number of separate actions at law against the same defendant to recover damages, where the plaintiffs have no community of interest, except in the question of law and fact involved, and cannot be proceeded against separately in equity.

2. SAME. *Injunction. Separate actions of trespass. Case.*

Accordingly, where a number of independent property owners have brought separate actions at law to recover damages of a railroad company for the burning of their property, it cannot enjoin them in equity, on the ground of preventing a multiplicity of suits, although the burning of all resulted from the same alleged negligent act, and all the actions involve the same question of law and fact.

3. APPEAL. *Error of jurisdiction. Const.* 1890, § 147.

An appeal from a decree enjoining such suits for multiplicity is not governed by § 147, const. 1890, prohibiting a reversal because of error as to whether the cause was of equity or common law jurisdiction, the question being merely as to the power in any court to join such parties in one suit.

FROM the chancery court of the first district of Hinds county. HON. H. C. CONN, Chancellor.

Calhoon & Green, for appellants.

A tort-feasor cannot invoke the jurisdiction of equity to enjoin suits begun at law for damages for the trespass growing out of a single past act, and compel the injured persons to join in one suit in equity, upon the sole ground of a common question of law and fact being involved. We submit that a careful examination of the authorities will show that this is the first case in England or America where a trespasser has obtained an injunction to shield him from actions at law for the tort on the ground of avoiding a multiplicity of suits.

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Brief for appellants.

1. To sustain the jurisdiction would not save a multiplicity of suits. The pleas are general denials of the declarations. Each defendant will be required by cross-bill to propound his claim with the same averments as in the declarations. The railroad company will then answer these, denying liability, and setting up contributory negligence or other affirmative matter. So the pleadings will present the same number of issues. Even if the question of negligence were a common one, there would have to be the same number of findings of fact. Besides, each issue presents a controverted question of liability, and each defendant is entitled to his jury trial. *Scott* v. *Neely*, 140 U. S., 106; *Nevitt* v. *Gillespie*, 1 How. (Miss.), 108. The allegation that a multiplicity of suits will be avoided is a conclusion of law, not a statement of fact.

Equity has no jurisdiction to enjoin, at the suit of the injured party, a suit for a single past trespass. *Mills* v. *N. O. Seed Company*, 65 Miss., 391; *Rogers* v. *Whitfield*, 26 *Ib.*, 84; *Blewitt* v. *Vaughn*, 5 How., 418; *Nevitt* v. *Gillespie*, *supra*.

3. In no case will the jurisdiction be exercised to restrain pending suits until the right has been established at law by one or more trials. 10 Paige, 539; 10 Ga., 395; 3 Johns., 566; 2 Johns. Ch., 281; 54 N. Y., 162; 1 High, Injunctions, § 63; 2 Story on Eq. Jur., § 859. Obviously, one suit could not in this case determine all.

The injunction was granted and sustained in the court below, following the broad language of Pomeroy. 1 Pom. Eq. Jur., §§ 181, 243, 255, 256. While the language of this author is broad enough to cover this case, we respectfully submit that his "conclusions" are not justified by the authorities he cites. All the cases cited in § 256 of that text-book involve recognized equities outside of the multiplicity of suits. In such case, the doctrine has been applied in this state. See *Coulson* v. *Harris*, 43 Miss., 728; *Richardson* v. *Scott*, 47 *Ib.*, 236; *M. & O. R. R. Co.* v. *Moseley*, 52 *Ib.*, 127; *Drysdale* v. *Pradat*, 45 *Ib.*, 445.

In none of the cases we have found has the jurisdiction

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been maintained solely because separate actions involve the same questions of law and fact. In this case the defendants could not be separately enjoined, and they have no community of interest in the subject-matter. In such case the injunction will not lie. 1 High, Injunctions, §§ 12, 61, 65.

In §§ 273, 274 Mr. Pomeroy, in summarizing the doctrine, does not mention a case like this. To sustain the jurisdiction would be against reason, and without the support of a single authority.

Williamson & Potter, on the same side.

It is apparent that the litigation involved in the suits at law cannot be lessened by sustaining the jurisdiction in equity. A distinct issue will have to be made between complainant and each defendant. The same amount of proof must be made, and depositions taken. The costs in the chancery court will be even greater than the aggregate costs in all the suits at law. Since the bill does not show how the harrassment of complainant will be diminished, and expense saved, it fails to show any grounds for invoking the jurisdiction of equity; for the remedy is complete and adequate at law. The doctrine that equity has no jurisdiction where the remedy of law is complete, applies to bills to prevent a multiplicity of suits. 6 Cal., 33; 1 Harr. Ch., 157; 1 Br. Ch. Rep., 200; 5 Blatch., 259; 7 Ala., 585; 43 Miss., 728; 45 *Ib.*, 445; *Ib.*, 705; 141 Mass., 92.

It is not a mere matter of convenience. Plaintiffs have the right to conduct their trials at law separately, by their own chosen counsel, and in the manner they desire. Each party is suing for his own property, for a different amount, and each case necessarily presents different questions.

As to the main question involved, we submit that equity has no jurisdiction. Strictly speaking, bills of peace are of two kinds: (1) To prevent the vexatious recurrence of litigation by a numerous class insisting upon the same right; (2) To prevent the same individual from reiterating an unsuc-

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Brief for appellee.

cessful claim. Bispham's Equity, § 415; Adams' Equity, § 199. The bill in this case must come under the first division. See Pomeroy, Eq. Jur., § 268.

The doctrine contended for by appellee finds no support anywhere, except in the text of Pomeroy. We have carefully examined all the authorities cited by this author, and fail to find a single one that sustains the text.

Complainant comes into equity with no legal rights adjudicated, and with no equitable rights to assert. It cannot invoke the jurisdiction to enjoin defendants separately, so we submit that the jurisdiction does not obtain.

Brame & Alexander, on the same side.

Mayes & Harris, for appellee.

The jurisdiction of equity to prevent multiplicity of suits was properly invoked in this case. The doctrine is clearly set forth in 1 Pomeroy on Eq. Jur., §§ 243–274.

There is no authority for the contention that the original rule does not apply in favor of a tort-feasor; otherwise the distinction would have found some expression in the authorities. It is contrary to the policy of the law to favor this class of litigation. The court, in exercising this jurisdiction, will not be deterred by the fact that the suits enjoined are for trespass. We refer the court to *Grand Junction Canal Co.* v. *Dimes*, 42 Eng. Ch., 38; 33 Fed. R., 629; 30 N. J. Eq., 154; 54 N. Y., 154; 2 Story on Eq. Jur., §§ 794–799; 1 Pom., Eq. Jur., § 254, note 1.

The actions enjoined in this case are for merely compensatory damages. The value of the property may well be adjudicated in the chancery court, and, as a matter of fact, can be more accurately ascertained by the chancery court, acting through its master, than by a jury.

The right of trial by jury is not involved on this appeal. If, on the hearing, the court holds a jury trial proper, it can be awarded.

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Argued orally by *M. Green* and *C. M. Williamson* for appellants, and *E. Mayes*, for appellee.

CAMPBELL, C. J., delivered the opinion of the court.

A number of different owners of property in the town of Terry, destroyed by fire from sparks emitted by an engine of the appellee, severally sued in the circuit court to recover of the appellee damages for their respective losses by said fire, alleged to have resulted from the negligence of the defendant. While these actions were pending, the appellee exhibited its bill against the several plaintiffs, averring that no liability, as to it, arose by reason of the fire, which arose, not from any negligence or wrong of it or its servants, but from the fault of others, for which it is not responsible; and that the plaintiffs in the different actions are wrongfully seeking to recover damages by their several actions, all of which grew out of the same occurrence, and depend for their solution upon the same questions of fact and of law. Wherefore, to avoid multiplicity of suits, and the consequent harrassment and vexation, all of the said several plaintiffs are sought to be enjoined from prosecuting their different actions, and to be brought in, and have the controversies settled in this one suit in equity. There is no common interest between these different plaintiffs, except in the questions of fact and law involved.

The injunction sought was granted, and the defendants served with process, when they appeared, and demurred to the bill, and moved to dissolve the injunction on the face of the bill. The case was heard on motion to dissolve the injunction, and it was overruled, and an appeal granted.

The question presented is as to the rightfulness of the suit against the defendants, on the sole ground that their several actions at law involve the very same matters of fact and law, without any other community of interest between them. The granting and maintaining the injunction are fully sustained by Pomeroy's Equity Jurisprudence, vol. 1, § 255, *et seq.*, and

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it is probable that any judge authorized would have granted the injunction upon the text cited. But we affirm, after careful examination and full consideration, that Pomeroy is not sustained in his "conclusions," stated in § 269 of his most valuable treatise, and that the cases he cited do not maintain the proposition that mere community of interest "in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body," is ground for the interposition of chancery to settle, in one suit, the several controversies. There is no such doctrine in the books, and the zeal of the learned and usually accurate writer mentioned, to maintain a theory, has betrayed him into error on this subject. It has so blinded him as to cause the confounding of distinct things in his view of this subject, to wit: joinder of parties, and avoidance of *multiplicity of suits*. It has been found that many of the cases he pressed into service to support his assertion are on the subject of joinder, where confessedly there could be no doubt that the matter was of equity cognizance. Every case he cited to support his text will be found to be either where each party might have resorted to chancery or been proceeded against in that forum, or to rest on some recognized ground of equitable interference other than to avoid multiplicity of suits. The cases establish this proposition, viz.: Where each of several may proceed or be proceeded against in equity, their joinder as plaintiffs or defendants in one suit is not objectionable; but this is a very different question from that, whether, merely because many actions at law arise out of the same transaction or occurrence, and depend on the same matters of fact and law, all may proceed or be proceeded against jointly in one suit in chancery; and it is believed that it has never been so held, and never will be, in cases like those here involved. Where each of several parties may proceed in equity separately, they are permitted to unite, and make common cause against a common adversary, and one may

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implead in one suit in equity many who are his adversaries, in a matter common to all in many cases, but never when the only ground of relief sought is that the adversaries are numerous, and the suits are for that not in itself a matter for equity cognizance. Attention to the distinction mentioned will resolve all difficulties in considering the many cases on this subject. There must be some recognized ground of equitable interference, or some community of interest in the subject-matter of controversy, or a common right or title involved, to warrant the joinder of all in one suit; or there must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be joined in one suit; and it is not enough that there "is a *community of interest merely in the question of law or of fact involved*," etc., as stated by Pomeroy in § 268. Although he asserts that this early theory has long been abandoned, he fails utterly to prove it. An examination of the cases he cited under § 256 *et seq.*, will show this to be true. The opinion of the justice (Harlan) in 43 Fed. Rep., 824, does support the text of Pomeroy, and cites 1 Pom. Eq. Jur., §§ 245, 255, 257, 268 and 273, and *Crews* v. *Burcham*, 1 Black, 352, 357. We are content with what has already been said as to the text of Pomeroy, and affirm that not one of his citations sustains his conclusion and the language of Harlan, J., in the case cited; nor does *Crews* v. *Burcham* sustain the language of Justice Harlan. It belongs to the class of cases where each party might have brought his bill, and all who had a common cause were permitted to make common contest in chancery with their adversaries who were united by a common tie.

The decision of the case in which Harlan, J., gave his support to the doctrine of Pomeroy, is not complained of, but the opinion is not justified by any case with which we have been made acquainted. The case was one in which each might have brought his separate bill to quiet title, and all concerned were permitted to unite in one bill against their

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common adversary; and so, it is believed, will be found all the cases on this subject. Certainly, those relied on by Pomeroy are of this character. Those cited in the note to § 269, in which he asserts most broadly the doctrine we combat, are *Keese* v. *Denver*, 10 Col., 112; *Carlton* v. *Newman*, 77 Me., 408; *DeForest* v. *Thompson*, 40 Fed. Rep., 375; *Osborne* v. *Railroad Co.*, 43 Fed. Rep., 824; *Railroad Co.* v. *Gibson*, 85 Ga., 1; *The Schuyler Fraud Case*, 17 N. Y., 592; *The Water Company Case*, L. R., 2 Ch., 8; and the case of the *Complicated Contract*, 7 N. J. Eq., 440. The case in 43 Fed. Rep., 824, has already been noticed *supra*. The opinion in the case in 10 Colorado quotes the language of Pomeroy's Eq. Jur., § 269, but the case was one where one or more plaintiffs may sue in equity for the benefit of all others similarly situated.

Carlton v. *Newman*, 77 Me., 408, affirms the jurisdiction of equity to enjoin the collection of an illegal tax for the purpose of preventing multiplicity of suits, where the entire levy, affecting all the tax-payers, was illegal. It appears to be exceptional, and to rest on peculiar grounds, not applicable to the case before us. The opinion cites Pomeroy's Eq., § 269, but seems to rest on the proposition that the whole tax was illegal.

The case in 40 Fed. Rep., 375, was that of a plaintiff exhibiting a bill to set aside a sale of land, and vacate deeds made in pursuance of it, against numerous parties, all of whom claimed by separate parcels, but under the proceeding attacked as void. A bill might have been exhibited against each one separately, and it was held to be proper to unite all in one suit. That was clearly right; but Jackson, J., in his opinion, concurred in by Harlan, Justice, cited 1 Pomeroy's Equity Jurisprudence, §§ 245–269, inclusive, which we have shown to be unsupported by any case of authority.

The case in 85 Georgia is where a few persons, as *representaitves of a class* consisting of many, exhibited a bill in behalf of all, and lends no countenance to the proposition for which it is cited. The cases in 17 N. Y., 592, L. R., 2 Ch. 8, and 7

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N. J. Eq., 440, furnish no sort of support to the text of the author, and it is confidently claimed that every case that can be found, if entitled to any consideration, will be seen to be one resting on some other principle than that for which it has been cited in the connection now under review. And, while judges have, in various instances, cited and sometimes quoted Pomeroy, in the language above characterized as unsupported, in every instance, we think, the case will be found not to call for it, but to be resolvable, independently of it, upon other grounds of equitable interference, and, in our opinion, not one of the learned courts which have cited or quoted Pomeroy in the way mentioned, would sustain this bill if it was before it for decision. There is danger that by frequent repetition and piling up assertions—judges citing and quoting text-books, and text writers citing the cases thus referring to them—a false doctrine may acquire strength enough to dispute with the true; but we do not believe that any accumulation of dogmatic assertions and citations and quotations can ever establish the proposition that a defendant sued for damages by a dozen different plaintiffs, who have no community of interest or tie or connection between them, except that each suffered by the same act, may bring them all before a court of chancery in one suit, and deny them their right to prosecute their actions separately at law, as begun by them. It has never been done. There is no precedent for it, and, while this is not conclusive against it, it is significant and suggestive. If it is true, as stated by Pomeroy, and some quoting him, that mere community of interest in matters of law and fact makes it admissible to bring all into one suit in chancery, in order to avoid multiplicity of suits, all sorts of cases must be subject to the principle. Any limitation would be purely arbitrary. It must be of universal application, and strange results might flow from its adoption. The wrecking of a railroad train might give rise to a hundred actions for damages, instituted in a dozen different counties, under our law as to the venue of suits against

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railroad companies, in some of which executors or administrators, or parents and children might sue for the death of a passenger, and, in others, claims would be for divers injuries. If Pomeroy's test be maintained, all of these numerous plaintiffs, having a *community of interest in the questions of fact and law*, claiming because of the same occurrence, depending on the very same evidence, and seeking the same kind of relief (damages), could be brought before a chancery court in one suit to avoid multiplicity of suits! But we forbear Surely the learned author would shrink from the contemplation of such a spectacle; but his doctrine leads to it, and makes it possible.

The learned counsel for the appellee here felt the difficulty of the possible result of the doctrine contended for, and sought to limit its application to controversies about property, excluding those for injuries to be redressed by the estimation of juries; but, as we have said, any such restriction is arbitary and inadmissible. If preventing multiplicity of suits is such a good thing as to justify bringing into one suit all who are interested in the same questions of law and fact, it is needful that its benefits shall be extended to all cases where it can be applied, and not restricted in its beneficent operation. It should have full sway in all classes of cases. The sole object, we are told, of the doctrine is to prevent multiplicity of suits by uniting all who have a common interest in the same questions in one suit, and it is quite as important to effect this in one class of cases as another; and, as actions against railroad companies are quite numerous these days, it is of especial concern to prevent multiplicity in this class of cases. Therefore, if the doctrine advanced were sound, it would have to be applied wherever the conditions prescribed exist—that is, wherever many are interested in the same questions of fact and law. That this is inadmissible must be apparent.

The case of *Supervisors* v. *Deyoe*, 77 N. Y., 219, contains a good illustration of what we have said. In that case the suit

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against numerous parties was maintained, because it combined elements of jurisdiction in each of the cases of interpleader, bill of peace and cancellation of written instruments.

The recovery of damages for a tort or breach of contract does not pertain to courts of chancery, which decree damages only in a very limited class of cases, or under peculiar circumstances, or as an incident to some other relief. 1 Pomeroy's Eq. Jur., § 112; 2 Story's Eq., § 799. Even this learned author, Pomeroy, does not say that the existence of numerous suits for damages by a tort or breach of contract, where each case depends on the same questions of fact and law, may be drawn into chancery in one suit, and no case has been found to warrant it. Every case cited by Pomeroy, and by the learned and diligent counsel in this case, has been examined, and may be disposed of on some other principle acted on by courts of chancery than that contended for, and necessary to sustain the bill in this case. Every case is resolvable on some well-recognized principle of equity procedure, and not one sustains this bill.

The cases repudiating the doctrine contended for are numerous. We do not cite them, for it is unnecessary, in view of the fact that not a case has been found in England or America to sustain this bill.

No question as to mistake of jurisdiction between courts of law and chancery, within the contemplation of section 147 of our constitution, arises in this case, for, if we had only one forum armed with full power to administer all remedial justice, joinder of all these parties in one action would not be admissible. Bliss on Code Pleading. This author says, in section 76: "Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the down-flow of the water, and may unite to restrain or abate it as a nuisance, but they cannot hence unite in an action for damages; for, as to the injury suffered, there is no community of interest. There is no more a common interest than though a carrier had, at one

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Syllabus.

time, carelessly destroyed property belonging to different persons, or the lives of different passengers;" thus putting the very case we have. The supreme court of California has cited with approval this very section.

We thus confront Pomeroy with an equally intelligent author, and a decision by the supreme court of his own state, at war with his views on this subject, if, indeed, it is true that he would uphold this bill, which we do not believe.

We have written so much to combat error, supported by a distinguished author, and which has had a misleading influence, which should be counteracted before further injury results from it, as far as in our power to do it.

Reversed, and injunction dissolved.

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P. FAIRLY *v.* D. A. NASH.

1. PARTNERSHIP. *What constitutes. Sharing net profits. Intent.*

An agreement to share in the net profits of a business is not a conclusive test of a partnership. The intent of the parties, if not inconsistent with the terms of the contract, will control.

2. SAME. *Case in judgment.*

Nash and Skellinger agreed that Nash should furnish the money and buy goods, and Skellinger should "take charge of the business as agent and manager for Nash, and devote his whole time and attention to it, for which services he should receive half the net profits after paying debts, expenses and advances by Nash." The sign at the store was "W. S. Skellinger, agent for D. A. Nash." *Held,* not a partnership.

3. SAME. *Character of contract. Minor stipulations.*

The character of said contract, as creating a mere agency and not a partnership, is not changed by other stipulations in it, relating to mere details of management, such as employment of clerks, keeping books, stated accountings, and division of profits, and the requirement that such agent shall also divide profits derived from any outside business engaged in by him.

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Brief for appellant.

4. AGENCY. *Manager. Power to bind principal by note.*

An agent, having general authority to manage his principal's mercantile business, has, by virtue of his employment, no implied power to bind his principal by making, accepting or indorsing negotiable paper.

5. SAME. *Execution of note. Principal not bound thereon.*

Although a note executed by such general agent, signed in his name as agent, was for money borrowed to pay debts of the business, the principal is not liable in an action *on the note*, whatever may be his liability if sued on the common counts for the money so used.

FROM the circuit court of the first district of Hinds county.
HON. J. B. CHRISMAN, Judge.
The opinion states the facts.

Brame & Alexander, for appellant.

The features of the contract indicating a partnership are as follows:

1. Sharing net profits. This is *prima facie* a test of a partnership. No intent to create a mere agency appears on the face of the agreement. 1 Lindley on Partnership, 34; 1 Bates on Partnership, § 15; *Wood* v. *Thompson*, 22 How. (U. S.), 330; *Lynch* v. *Thompson*, 61 Miss., 354; *Tharp* v. *Marsh*, 40 *Ib.*, 158; 114 Mass., 114; 105 N. C., 283; 127 Pa., 442.

2. The debts were payable, not by Nash, but out of the business. Even the share of Skellinger was not a debt against Nash. He could not sue Nash at law.

3. Each had a voice in selecting clerks, and the books were always open to both.

4. Skellinger's profits were as contingent as Nash's. Neither could draw out any thing until an accounting. The machinery for terminating the relation was as complicated as in partnerships. Skellinger had the right to compel the application of the assets to the payment of debts.

5. No time was fixed for the duration of the relation. The interests could be separated, and a settlement had, only in chancery.

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Brief for appellee.

6. Skellinger was to divide the profits of any other venture. Surely, he was not a mere agent in so doing.

Even as general agent, Skellinger had the implied power to protect the business from ruin. Debts were unpaid, and accumulating. In borrowing money to pay them, no new or greater liability was incurred. The outstanding debts were valid. Skellinger, having express power to make debts, had an implied power to provide, by borrowing, for their payment.

Finally, if not technically liable on the note, Nash is liable as for money had and received. No pleadings are necessary in the justice court. If, under the evidence, defendant is liable, it was error to grant the peremptory instruction.

D. Shelton, for appellee.

1. The contract itself terms the parties *principal and agent*, not partners. The sign proclaimed the agency.

2. Nash, as principal, furnished the money, and Skellinger conducted the business as "agent and manager" for Nash.

3. No power to borrow money or execute interest-bearing notes is conferred.

The foregoing provisions negative the idea of a partnership. Sharing the net profits cannot change the character of the agreement. There was no contract to share loss. Nash's investment was to be returned. If lost, he could not recover of Skellinger half of it. There was no mutual sharing of profits, each as a principal trader. See Collier on Partnership, §§ 25, 27; Story on Partnership, § 55.

As the agreement shows an intent to create Skellinger merely a superintending agent, this intent will control.

An agent has no implied power to bind his principal by borrowing money and executing notes. In this case, no express authority was shown, and the instrument, by expressing certain powers, excludes all others.

E. E. Baldwin, on the same side.

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Opinion of the court.

Argued orally by *C. H. Alexander*, for appellant, and *E. E. Baldwin*, for appellee.

COOPER, J., delivered the opinion of the court.

In July, 1890, D. A. Nash, the appellee, and one W. S. Skellinger entered into a written contract, the terms of which were as follows:

"It is agreed between said parties that the said Nash shall furnish the money to purchase the stock and fixtures of Isydore Schwartz, at No. — South State street, Jackson, Miss., and to fill out said stock, as may be necessary for the purpose of carrying on said business; that the said Skellinger shall take charge of the business, as agent and manager thereof for the said Nash, and shall devote his whole time and attention to the carrying on thereof, for which service he shall receive one-half of the net profit of the said business, after payment of the advances of the said Nash and the debts and expenses; that a clerk, to be agreed upon by the said parties, shall be kept, who shall keep the books of the concern; that the books shall be open to both of said parties, and a general settlement between them shall be had every six months, when an inventory of the stock shall be taken, and the debts and accounts listed, and the amount of the net profit for the six months determined. And it is further agreed upon by and between said parties that if the said Skellinger shall, during the time when the agreement is in force, engage in any other business outside of that provided for in this agreement, out of which should arise any profits, such profits shall be divided by him with the said Nash, and shall, monthly, render to said Nash a statement of any such other business engaged in by him, and the profits thereof, and pay to said Nash the half of said profits. The said business is to be carried on as heretofore, as a confectionery, fruit and cigar and tobacco business; the sales are to be for cash, and the credit purchases shall not exceed two hundred dollars outstanding at any one time.

D. A. NASH,
W. S. SKELLINGER."

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Under this agreement the business was conducted, a sign being over the door, on which were the words "W. S. Skellinger, agent for D. A. Nash."

Skellinger opened an account with the Capital State Bank in his name, as agent, depositing the money arising from said business, and drawing checks thereon in discharge of accounts for goods bought by him therein. On December 2, 1890, the Capital State Bank had for collection a number of drafts, drawn on Skellinger, agent, for goods bought by him in conducting the business under the contract with Nash, and there was no money in bank to the credit of Skellinger, agent.

To raise money with which to discharge these claims, Skellinger applied to the appellant, Fairly, to become surety upon a note for $100, payable to the Capital State Bank, and represented to him that, as agent for Nash, he had full authority to make the note. Relying upon this representation, and the fact that Skellinger was the recognized agent of Nash to conduct the business, and was so conducting it, Fairly joined in the execution of the note with Skellinger, who signed the same "W. S. Skellinger, agent," intending thereby to bind Nash as his principal. The bank discounted the note, and placed the proceeds to the credit of Skellinger, agent, who drew checks upon the fund thus created in payment of the accounts due in the business of Skellinger, agent for Nash; and, in the payment of such accounts, the amount was exhausted, except as to about eleven dollars, which amount was paid out on the order of Skellinger, agent, to one Carraway—who was the father-in-law of Nash—but on what account this payment was made does not appear in evidence.

When the note above spoken of matured, Skellinger failed to pay it, and Fairly, the surety, being called on by the bank, paid the amount to the bank, which indorsed thereon the words:

"Transferred without recourse to P. Fairly.

CAPITAL STATE BANK,
By E. M. PARKER, *Cashier*,"

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and delivered it to Fairly. Fairly thereupon filed the note, as his cause of action, with a justice of the peace, and caused process thereon to be issued against Nash and Skellinger.

Skellinger made no defense, and a judgment by default was taken against him. Nash filed a plea of *non est factum;* and, a judgment having been rendered against him by the justice of the peace, appealed to the circuit court, where, upon the development of the facts as above set forth by the witnesses for the plaintiff, the court gave a peremptory instruction for the defendant, Nash, and there was a verdict and judgment for him, from which Fairly appeals.

It is contended for the appellant:

1. That the contract between Nash and Skellinger constituted a partnership between them;

2. That, if Nash and Skellinger were not partners, then Skellinger was the agent of Nash, having authority, real or apparent, to bind him by the note;

3. That the money raised by Skellinger and Fairly from the bank, having been applied to the payment of debts which were obligatory on Nash, he has, in contemplation of law, received money which, *ex æquo et bono*, should be repaid to the bank, and to Fairly, as its assignee, if Nash repudiates the authority of Skellinger to bind him by the note, and, for this, he is liable to this action.

The feature of the agreement principally relied upon to establish the existence of a partnership is that Skellinger was to receive a part of the profits, and, as the appellant contends, a right to call Nash to an accounting every six months.

In the earlier cases in which this question was considered, the receipt by one of a part of the profits of a business, fixed upon him the character of a partner as to third persons, "upon the principle that by taking a part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." *Grace* v. *Smith*, 2 Blackstone, 998; *Waugh* v. *Carver*, 2 H. Blackstone, 235 (1 Smith's Lead. Cas., 908).

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Opinion of the court.

But it has, since these decisions, become well settled that the mere sharing of the profits of a business does not constitute one a partner. The question is whether the profits are taken as in a distribution of a joint estate, in which event there is a partnership, or, on the other hand, as compensation for services as an agent or servant, the title in such profits passing to such person by the act of distribution and not in the accumulation, in which case the contract is one of principal and agent, and not of partnership.

In the leading case of *Wheatcroft and Cox* v. *Hickman*, 9 C. B., N. S., 47, the subject was fully considered, and the rules now prevailing settled. In that case Lord Cranworth said: "It is often said that the tests, or one of the tests, whether a person not ostensibly a partner is nevertheless in contemplation of law a partner, is whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test, for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to the profits, or a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing that entitles him to the one, makes him liable to the other, namely, the fact that the trade has been carried on in his behalf, *i. e.*, that he stood in relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made."

The subject has been further considered by the English courts in *Pooley* v. *Driver*, 5 Ch. Div., 458; *Ex parte Tennant*, 6 *Ib.*, 303; *In re Wedgwood*, 7 *Ib.*, 75; and while there has been some criticism upon the language of Lord

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Cranworth and of that of the other judges in *Cox* v. *Hickman*, the rule that a participation in profits is not conclusive evidence of partnership, is always recognized. Such participation is evidence of a partnership, and, in the absence of countervailing evidence, will control. *Tharp* v. *Marsh*, 40 Miss., 158; *Lynch* v. *Thompson*, 61 *Ib.*, 354. But the question is one of intention, and a contract of partnership will no more be created by the courts against the will of a party than will those of any other character.

One may not make a contract of partnership, and, calling it an agency, have it treated as such by the courts; for, when the facts are known, the law fixes the legal consequences which flow from them. Neither may one secure the benefits of the relation of a partner, and, by contract, secure immunity from its obligations as against creditors. But when the contract is susceptible of the construction put upon it by the parties at the time it was made, such construction will be accepted by the courts as the true one. The American and English cases supporting these propositions will be found collected in the note to the case of *Waugh* v. *Carver*, 1 Smith's Lead. Cas., 908.

In the contract between Nash and Skellinger we find a manifest purpose not to create a partnership contract. The agreement was that Skellinger should "take charge of the business as agent and manager for Nash, and shall devote his whole time and attention to the carrying on thereof, for which service he shall receive one-half of the net profits of the said business, after payment of the advances of the said Nash and the debts and expenses."

The other stipulations in the deed do not in any manner affect the character of the contract. They have relation to details of the business by which the amount of the profits may be discovered, and the periods at which the payments to Skellinger shall be made. Stress is put by counsel upon the fact that very broad powers are given to Skellinger, and that, in fact, the entire control and management of the busi-

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ness is intrusted to him. But such is very generally the case in sales on commission by one for another. The question is not whether Skellinger was agent for Nash, or, if he was, how extensive were his powers, but whether Nash was also agent for Skellinger, for, if there was a partnership, each partner was authorized to do whatever both might do in the prosecution of the firm business. We are of opinion that no partnership existed between the parties, but that the business was that of Nash, the management of which was intrusted to Skellinger, as his agent.

2. Skellinger, as agent for Nash, had no authority to bind him by the execution of the note to the bank. "An agent, having general authority to manage his principal's business, has, by virtue of his employment, no implied authority to bind his principal by making, accepting or indorsing negotiable paper." Mechem on Agency, § 398; *Perkins* v. *Boothby*, 71 Maine, 91; *New York Iron Mine* v. *Negaunee Bank*, 39 Mich., 644; *Sewanee Mining Co.* v. *McCall*, 3 Head, 619.

3. The plaintiff was not entitled to recover on the ground that the money raised by the agent had been devoted to the payment of debts binding on Nash, for the reason that this is an action *on the note*, and not upon a *quantum valebat*. While in suits before a justice of the peace no written pleadings are required, it is necessary for the plaintiff to indicate the nature and character of his suit by lodging with the justice "the evidence of debt, statement of account, or other written statement of the cause of action." Code of 1880, § 2196.

It seems to be well settled that where an agent exceeds his authority in the execution of a negotiable instrument, and the money received thereon is devoted to the business of the principal, he must, in repudiating the act of his agent, restore the amount received and used for his business; and if he does not, an action may be maintained, not on the instrument, but upon the common counts. *Merchants, etc., Bank* v. *State Bank*, 10 Wallace, 604; *Mayor, etc.*, v. *Lindsey*, 19 *Ib.*, 485; *Perkins* v. *Boothby*, 71 Me., 91.

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Statement of the case.

Upon the case as made, the court properly instructed the jury to find for the defendant, and the judgment is

Affirmed.

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WARREN & MONTGOMERY BROS. v. M. JONES.

1. PARTNERSHIP. *Changed to landlord and tenant. Notice to creditors.*

Where the owner of a plantation forms a partnership with another to make a crop thereon, and afterwards, early in the year, the arrangement is changed, the partner becoming a tenant, third persons, dealing with him individually, but who had no dealings with the firm, are not entitled to be specially notified of the change in the relation from that of partners to that of landlord and tenant, though they had knowledge of the partnership while it existed.

2. SAME. *Purchasers. Notice. Misleading instructions.*

In such case, where the third persons who had no dealings with the firm, are sued by the landlord for purchasing from the tenant agricultural products upon which he had a lien, it is proper to refuse instructions which assert that, in order to make defendants liable, it was necessary that they should have had "knowledge or notice" of the change from a partnership to a tenancy. As such instructions might be construed as meaning that it was essential that they should be specially notified, they would be calculated to mislead the jury.

3. LANDLORD'S LIEN. *Purchaser. Notice. Caveat emptor.*

In a suit against one who has purchased and converted agricultural products upon which the plaintiff has a landlord's lien, neither ignorance as to the tenancy nor false statement by the tenant as to his right to sell will defeat the landlord's claim. *Eason* v. *Johnson*, 69 Miss., 371.

FROM the circuit court of Yazoo county.

HON. J. B. CHRISMAN, Judge.

Appellee, Jones, owned a plantation in Holmes county, Mississippi. On January 1, 1890, he entered into a partnership agreement, in writing, with one R. G. Worsham, by which they were to cultivate the plantation during that year

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on joint account. There was a steam-gin and saw-mill on the place, which were to be operated under the agreement. Worsham was to give his personal attention to the business. Jones lived at Kosciusko, in another county. The partnership affairs were conducted under the supervision of Worsham until March 4, 1890, when the agreement was changed, the partnership was dissolved, and Worsham became the tenant of Jones, executing a written lease, by which he agreed to pay $2,500 for the rent of the plantation and the use of the mules thereon. In December, 1890, Worsham delivered to appellants, Warren & Montgomery Bros., merchants in Yazoo City, eleven bales of cotton, raised by him on the plantation of appellee that year. The cotton was sold by appellants, and the proceeds accounted for and paid over to Worsham. Appellants knew of the partnership existing between Jones and Worsham, and their testimony was to the effect that, when they received the cotton from Worsham, they supposed he was still a partner, never having heard of the change from a partnership to a tenancy. In accordance with their custom, they inquired of Worsham, at the time, as to his right to sell the cotton, and he informed them that it was all right; that he had to sell the cotton in order to raise money to finish marketing the crop and winding up the business.

Worsham having failed to pay the rent in full, this action was brought by Jones against appellants for the value of the cotton so received by them. Defendants pleaded not guilty. On the trial the above facts were shown. It did not appear that any notice was given of the dissolution of the partnership, and the written lease was not recorded. There was some evidence tending to show that one of the defendants admitted that he knew that Worsham was the tenant of plaintiff, but this was contradicted. Defendants introduced testimony going to show that Worsham sold the cotton by consent of the landlord, but this was disputed, and there

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Statement of the case.

was a conflict of evidence on the point. As to this the court instructed the jury, at the instance of defendants, that the burden of proof was on plaintiff to show that the cotton was sold without his consent, and that if he consented to the sale he could not recover. On motion of plaintiff, the court excluded from evidence the contract of partnership, to which action of the court the defendants excepted. Defendants' third, fourth, fifth and sixth instructions, referred to in the opinion, are as follows:

"3. The court instructs the jury that, if they believe from the evidence that Worsham went on Jones' place in the beginning of the year 1890 as a partner of Jones—not as a tenant—and that the partnership continued until the fourth day of March, 1890, and that during the existence of the partnership defendants were informed by Worsham, one of the partners, that he was occupying the land as a partner, the jury must find for the defendant, unless it appears from the evidence that defendants knew the partnership had been dissolved, and that the relationship of landlord and tenant existed, or that defendants had such notice of the dissolution of the partnership and the creation of the tenancy as would justify the jury in imputing bad faith to them in selling the cotton as factors.

"4. The court instructs the jury that, if they believe from the evidence that Worsham entered into the possession of the Kearney place as a partner of Jones, and that, during the continuance of the partnership, Worsham, a partner, told defendants that he was on the place as a partner—not as a tenant—then the knowledge by the defendants that Worsham was on and cultivating the place, is not such knowledge or notice as would put them on inquiry as to whether or not Worsham was a tenant, unless they believe from the evidence that defendants had, before the delivery of the cotton to them, and before its sale by them, knowledge or notice of the change of the relationship of Jones and Worsham.

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Brief for appellants.

"5. The court instructs the jury that, if they believe from the evidence that the defendants knew that Worsham was occupying and cultivating the plantation of plaintiff during the year 1890, but were ignorant that the relationship of landlord and tenant existed, then such knowledge was not sufficient to put them on notice that Worsham was Jones' tenant.

"6. The court instructs the jury that, even if they believe from the evidence that defendants knew that Worsham was the tenant of Jones at the time of selling the cotton, yet, if they believe from the evidence that, on inquiry made by defendants, Worsham stated to them that there was no lien on the cotton, and he had a right to dispose of it, the law is for the defendants, and the jury will so find."

Verdict and judgment for plaintiff. Motion for new trial overruled. Defendants appeal. The opinion contains a further statement of the case.

Williams & Williams, for appellants,

Filed a lengthy brief as to the questions decided by the court, making the following points:

1. Defendants knew of the existence of the partnership, and, having received no notice of its dissolution, they had the right to assume that it still existed, and that Worsham, as a partner, had the right to dispose of the cotton. On this point see 17 Am. & Eng. Enc. L., 1117, 1118, and cases cited; 5 B. & A., 157.

As to former dealers, actual notice of dissolution must be given; as to others, general notice. *Polk* v. *Oliver*, 56 Miss., 566; 17 Am. & Eng. Enc. L., 1122–1127. See also *Boyd* v. *Ricketts*, 60 Miss., 62; 61 *Ib.*, 359. Here no notice was given, and no change was made in the conduct of the business. And the transaction with Worsham was within the scope of the business. It was, therefore, error to refuse defendants' third instruction.

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Brief for appellants.

It was also error to refuse the fourth instruction. Knowledge that Worsham was on the place was not notice that he was there as tenant instead of partner. *Claiborne* v. *Holmes*, 51 Miss., 146. When a vendor holds possession by a tenant, and the vendee, after the sale, retains the same tenant, the title is transferred, but there is no change of possession sufficient to arrest notice or put a creditor or purchaser on inquiry. *Loughridge* v. *Bowland*, 52 Miss., 546. *Bacon* v. *Howell*, 60 Miss., 362, does not militate against our position, but rather supports it.

2. In *Eason* v. *Johnson*, 69 Miss., 371, it was held that the right of the landlord to recover is not affected by the want of knowledge on the part of the purchaser that the "rent is *due and unpaid.*" This is far from deciding that the landlord may recover of one who has purchased from the tenant without knowing that he was tenant or having knowledge of some fact that would put him on inquiry. The court did not overrule *Dunn* v. *Kelly*, 57 Miss., 825, and *Cohn* v. *Smith*, 64 *Ib.*, 816. We think the rule laid down in the last mentioned case is right. Saying in *Eason* v. *Johnson* that the "rule of *caveat emptor* applies to all who purchase from a tenant," etc., simply means, as we construe it, that the rule applies to all buying from one whom the purchaser knows to be a tenant, or about whom he has such knowledge as ought to lead to inquiry.

3. The court erred in defendants' first instruction, and in giving the third for plaintiff, the effect of which was to inform the jury that, although Jones gave Worsham permission to sell enough cotton to pay for gathering the crop, yet if prior to the sale to defendants he had sold more than enough for that purpose, the sale to defendants was unauthorized. This was misleading, and, besides, the consent to sell having been once given, ought to have been withdrawn. *Cohn* v. *Smith*, 64 Miss., 816. If Worsham was selling more than sufficient to complete the crop, it was incumbent on the land-

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Brief for appellee.

lord to withdraw his consent, and not allow the tenant to damage innocent parties.

4. Aside from the above questions of law, the verdict is clearly contrary to the law and evidence.

Barnett & Thompson, on the same side.

The burden of proof rested on plaintiff to show notice of dissolution of the partnership. 17 Am. & Eng. Enc. L., 1118. Defendants, having acquired knowledge of the fact of partnership and who were the partners, were entitled to notice of the dissolution. There was no notice, and the change to a tenancy was evidenced only by a written lease, known only to the parties. On this point, see *Boyd* v. *Ricketts*, 60 Miss., 62. It makes no difference that this was a non-trading partnership. The dealing with defendants was within the scope of the business. *Lynch* v. *Thompson*, 61 Miss., 354. But the court excluded the partnership agreement from evidence, and, by its instructions, in effect, refused to permit the jury to consider the case with reference to the partnership idea. The case of *Bacon* v. *Howell*, 60 Miss., 362, has no application. There the tenant made a misstatement, and this should not have been relied on. Here Worsham, the partner, made a *true* statement, whereby appellants obtained knowledge that the partnership existed. As to them, there was no dissolution.

This case was tried in ignorance of the case of *Eason* v. *Johnson*, not then reported. But that case simply holds that want of knowledge "that the rent is *due and unpaid*," will not defeat the landlord. This is a different case entirely. But, if we are mistaken as to this, the extraordinary right of the landlord should be denied him wherever he has so conducted himself as to induce strangers to believe that his relationship to the occupant of the land is not that of landlord, but something else.

Henry & Richardson, for appellee.

Those who deal with an individual jointly interested with

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another, in planting operations, must, at their peril, inform themselves as to the relations between the parties. 45 Miss., 508; 48 *Ib.*, 300; 50 *Ib.*, 358; *Morgan* v. *Pierce*, 59 *Ib.*, 210; *Bacon* v. *Howell*, 60 Miss., 362.

It clearly appears that appellants dealt with Worsham only as an *individual*, and not as a member of any firm. Therefore they were in no event entitled to notice of the change from a partnership to a tenancy, and the court acted properly on the instructions as to this. Worsham did not sell the cotton as partnership property, but as his own, claiming that Jones had given his consent. On this point, see Story on Partnership, § 134.

No notice whatever of the tenancy is necessary. A purchaser of agricultural products from the tenant, takes them subject to the claim of the landlord. *Caveat emptor* is the rule. *Eason* v. *Johnson*, 69 Miss., 371.

The issue as to whether Jones consented to the sale of the cotton was fairly submitted to the jury, and appellants are concluded by the verdict.

CAMPBELL, C. J., delivered the opinion of the court.

The right result was reached in this case. The theory of the defense was fairly put to the jury by the instructions, so far as related to consent of Jones that his tenant might sell. The instructions asked by the defendants as to the partnership between Jones and Worsham, and the right of the defendants with reference to that, were properly refused, because they do not state the rule of law on that subject correctly. They assert that the defendants must have had *knowledge or notice* of the change of the relation between Jones and Worsham from that of partners to that of landlord and tenant. Not having dealt with Jones & Worsham during the brief period of the existence of the partnership between them, they were not entitled to be specially notified, and the instructions might be construed to require this.

The fifth and sixth instructions asked by the defendants

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Suggestion of error.

were properly refused. Neither ignorance of the tenancy nor false statement by the tenant as to his right to sell agricultural products of the leased premises could defeat the claim of the landlord. *Eason* v. *Johnson*, 69 Miss., 371. The writer of this opinion entertained the view, shared by all composing the court then, announced in *Westmoreland* v. *Wooten*, 51 Miss., 825, and he re-affirmed it in *Wooten* v. *Gwin*, 56 Miss., 422, and in *Dunn* v. *Kelly*, 57 *Ib.*, 825, and still has the same opinion of the question as an open one; but, as the court, by a clear misconception, as I think, of the views of one of the judges who decided the former cases, in the opinion in the case last mentioned, *drifted* into the conclusion that a landlord might hold a purchaser with notice liable, I acquiesced in the doctrine thus accidentally established, because I got tired dissenting, and, besides, regarded the new doctrine as best for the agricultural interest, and made no dissent from the opinion in *Cohn* v. *Smith*, 64 Miss., 816, which, under the strange history of the question, I thought correctly decided. Having reached this result, it followed logically that notice by the purchaser of agricultural products could make no difference, and, in order to protect the landlord, his right must be made to depend not on notice, but on the fact that the defendant purchased what the landlord had a lien on, and thus the law is settled.

I was constrained by circumstances, as I think my brethren were, in deciding *Cohn* v. *Smith*, but, starting from that, there could be no other goal than that reached.

Affirmed.

Barnett & Thompson, for appellants, filed the following suggestion of error:

In its opinion the court says: "They [the instructions] assert that the defendants must have had knowledge or notice of the change of the relation between Jones and Worsham from that of partners to that of landlord and tenant. Not having dealt with Jones & Worsham during the brief pe-

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Response to the suggestion of error.

riod of the existence of the partnership between them, they were not entitled to be specially notified, and the instructions might be construed to require this."

It is true defendants were not entitled to a special notice of the dissolution of the partnership, and, if the instructions are susceptible of this construction, they were erroneous. But we respectfully submit that when the instructions are considered in connection with the testimony, they could not have been misleading. There was no controversy over the kind of notice given. The plaintiff wholly failed to show that notice, either general or special, was given. The necessity, therefore, of defining in the instructions what kind of notice the defendants were entitled to was not apparent to us at the time the instructions were asked.

We proceeded on the assumption that, having shown the existence of a partnership, and a knowledge of its existence by defendants during its life, and their ignorance of its dissolution, the burden of proof was on the plaintiff to show that notice had been given that the partnership had been dissolved. The burden of proof was on the plaintiff. 17 Am. & Eng. Enc. L., 1117, 1118. But did defendants have knowledge of the dissolution? About this there was a conflict of testimony. And was notice of any kind of the dissolution given, either general or special? The testimony failing to show that any notice was given, how could the jury have been misled?

The testimony was as convincing that no *general* notice was given as that no *special* notice was given. There was an utter want of evidence of either.

Per curiam.

The partnership feature of the case was not regarded by us as important, and the instructions on that were remarked upon merely to call the attention of counsel to their inaccuracy, which they admit.

The evidence shows that Worsham was dealt with individ-

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ually on his own account, and without reference to any supposed connection with Jones.

Denied.

J. L. GRIGGS *v.* JESSE FRENCH PIANO AND ORGAN COMPANY.

JUSTICE OF THE PEACE. *Jurisdiction. Attachment. Code*, 1880, §§ 2191, 2475.

Under §§ 2191, 2475, code 1880, a justice of the peace has jurisdiction to issue the writ and try the cause in an attachment suit against a non-resident, although the only property attached is in another district of the county; and this, too, where there is a qualified and acting justice in such other district.

FROM the circuit court of Noxubee county.

HON. S. H. TERRAL, Judge.

On October 16, 1891, appellant, Griggs, sued out an attachment against the appellee before a justice of the peace of district 3, Noxubee county, for $165. The defendant was a non-resident of the state, and the attachment was sued out on that ground. It was made returnable before said justice, and was levied on a piano, the property of defendant, in district 4, no property being found in district 3. The defendant was not served with process, but gave bond for the forthcoming of the piano to abide the judgment. Defendant appeared by counsel, and made a motion in the justice court to quash the levy and dismiss the suit, upon the ground that the justice had no jurisdiction. This motion was overruled, and a trial was had, resulting in a judgment for plaintiff, from which the defendant appealed to the circuit court. There the motion to dismiss was renewed. On the hearing of the motion the above facts were shown, and it was also shown that, at the time the attachment was sued out and levied, there were two qualified and acting justices in district 4, and,

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Brief for appellee.

further, that the debt or liability sued for was created by an agent of the defendant in district 3. From a judgment sustaining the motion and dismissing the suit plaintiff appealed.

A. C. Bogle, for appellant.

Section 2191, code 1880, declares that the jurisdiction of a justice of the peace shall be co-extensive with his county, and that he may issue process to be executed anywhere in the county. The only limitation as to suits is that the matter must be within his jurisdiction as to amount, and that a freeholder or householder must be sued in his own district, or where the liability was incurred. Here the defendant is not a freeholder or householder, hence the limitation as to place of suit does not apply.

Section 2475, code 1880, is the only other statute affecting the jurisdiction of the justice in a case like this. It provides that a justice of the peace may issue attachments returnable before himself or any other justice of any district where the defendant or his property may be found.

The cases of *Smith* v. *Mulhern*, 57 Miss., 591, and *Baum* v. *Burns*, 66 *Ib.*, 124, are not applicable. The act of 1884 does not change the above provisions of the statute.

Giving the replevin bond was an appearance, and was a waiver of any irregularities in the proceedings. 39 Miss., 357; 62 *Ib.*, 600.

T. W. Brame, for appellee.

Section 2418, code 1880, provides that the writ of attachment shall be issued to the county where the defendant has property or debts, and shall be returnable to the *circuit court of the county in which the defendant or property or debts may be found*, and shall be the leading process. This was amended by the act of 1884 (Laws, p. 78), by inserting after "any county" the words "or of a justice of the peace of any district." Section 2475 of the code also provides that a justice of the peace may issue attachments returnable before

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himself, or other justice of any district where the defendant or any of his property or effects may be found. What gives the jurisdiction is that the writ must be returnable in the district in which either the defendant or his effects may be found. A plain construction of the statute fixes this as being true. Besides, *Baum* v. *Burns*, 66 Miss., 124, is, we think, decisive.

The jurisdiction is not determined by § 2191 of the code, as contended, because the debt was contracted in district 3. The jurisdiction of attachment suits is regulated by § 2418, code 1880. Even if a citizen is sued in attachment in a county where he does not reside, if his property is there, which gives jurisdiction, the cause cannot be removed to the county of his residence under § 1498 of the code. See *Baum* v. *Burns*, *supra*.

The judgment rendered in the justice court was absolutely void under that decision. The fact that appellee defended the case was not a waiver of the plea in abatement or motion to quash. 57 Miss., 676. The judgment should be affirmed.

WOODS, J., delivered the opinion of the court.

The jurisdiction of every justice of the peace is co-extensive with his county, and he may issue any process in matters within his jurisdiction, as is unmistakably to be seen on the face of section 2191, code 1880. The limitation of this jurisdiction arises in two classes of cases, viz., where freeholders or householders are defendants. But this limitation is itself subject to exception. The limitation on the jurisdiction co-extensive with the county is that every freeholder or householder shall be sued in the district in which he resides, if there be an acting justice therein, and qualified to try the householder's or freeholder's suit; but the limitation is not without exception. The householder may be sued in the district in which the debt was contracted, the liability incurred or in which the property may be found. The only limitation

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upon the jurisdiction co-extensive with the county is applicable alone to householders or freeholders of the county.

The other provisions of law touching the jurisdiction of justices in attachment suits is found in section 2475, and, by this section, it is clear that the justice issuing attachment writs, in cases within his jurisdiction as to amounts, may make them, in every case, returnable before himself or returnable before any other justice of any district in which the defendant or any of his property or effects may be found.

The writ in the case at bar was properly made returnable, the defendant being a non-resident, before the justice who issued it.

Reversed and remanded.

G. W. FAISON *v.* S. W. JOHNSON ET AL.

1. EXECUTION. *Death of defendant. Revivor. Code* 1880, § 1744.

   Where, before issuance of execution, one of several judgment defendants dies, a sale of his property thereunder, without previous revivor against the heirs, is void. Code 1880, § 1744.

2. TAX-SALE. *Who may buy. Obligation to pay the taxes.*

   A creditor who has previously charged the account of his debtor with the taxes due on the latter's land, and thus come under obligation to pay them, cannot acquire a tax-title at the sale for such taxes.

3. VOID SALE UNDER EXECUTION AND MORTGAGE. *Purchaser a trustee.*

   A judgment creditor, under such obligation to pay his debtor's taxes, and who also held a trust-deed covering his debtor's land, caused the same to be sold under an execution issued after the debtor's death, and without revivor against the heirs, and, on the same day, sold under the trust-deed and suffered a sale for taxes, becoming the purchaser at all three sales, intending to concentrate the titles in himself. The debt secured by the trust-deed was shown to be in large part satisfied. *Held*, the creditor was rightly decreed a trustee of the title for the heirs.

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Statement of the case.

FROM the chancery court of Sunflower county.

HON. W. R. TRIGG, Chancellor.

The appellees, children and heirs of Nancy E. Johnson, filed this bill against G. W. Faison, seeking to vacate certain sales, under which the latter had acquired title to and possession of lands belonging to their said mother, and to have him declared trustee in possession for them.

In August, 1883, Faison, the appellant, recovered a judgment against Nancy E. Johnson and her husband, Frank Johnson, for about $1,200, in pursuance of an office confession of judgment. She was also indebted to Faison upon an open account running through several years, and up to the time of her death. In 1882, she and her husband, Frank Johnson, had executed a trust-deed on the land in controversy, to secure Chaffe & Powell, of New Orleans, La., in an indebtedness, evidenced by note, of $1,641.75; and soon after her death, which occurred in November, 1883, Faison purchased from Chaffe & Powell their said debt and trust-deed.

During these transactions, a suit was pending against Nancy E. Johnson, in her life-time, and, after her death, against appellees, as her heirs, in which an adverse claim to the lands was asserted by Julia Porterfield. The title was further complicated by a levy, under a judgment against Frank Johnson, on the interest, which, as one of the heirs of Nancy Johnson, he had acquired at her death. But proceedings under this judgment were in some manner stayed by appellant Faison.

While matters were in this condition, Faison had execution issued upon the judgment aforesaid without first reviving it against the heirs, the execution reciting the fact of Nancy E. Johnson's death, as required by § 1744, code 1880. This execution was levied on a part of the land in controversy, and it was advertised to be sold March 2, 1885. Faison also procured the trustee to advertise the land for sale on the same day under the trust-deed. The taxes on the

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Statement of the case.

lands for 1884 were not paid, and they were likewise advertised to be sold for taxes on the second of March, 1885. Relative to the taxes, it was shown that Faison, who carried on his mercantile books an account against Nancy E. Johnson, which was continued in the same way after her death, had, in February, 1885, charged in the account the amount of the taxes on the land for 1884, as being paid by him.

Thus, Faison had either procured or allowed three separate sales of the land to be made on March 2, 1885, and at each sale he himself became purchaser, bidding at the execution sale, which, however, did not embrace all the land, the sum of $616, and at the trustee's sale, which occurred immediately afterward, bidding the sum of $2,820, and at the sale for taxes bidding the amount of the taxes due. Having received deeds under each purchase, Faison took possession of the land.

This bill has been filed by the heirs of Nancy E. Johnson other than Frank Johnson, her husband, and seeks to set aside the several sales under which Faison claims the land, and to have him declared a trustee of the legal title, which complainants acquired as heirs of Nancy E. Johnson, their mother. They allege that they were ignorant of the true condition of the account and indebtedness between Faison and their mother, and prayed discovery as to the balance due, and offered to redeem. The bill also averred that the three sales of the land were brought about under a verbal agreement with Faison that he should buy at the sales, and shelter in himself the legal title pending the litigation with Mrs. Porterfield, and that complainants should continue to pay the indebtedness, and, when the litigation was over, and the debts paid, by rents or otherwise, the title was to be reconveyed by Faison. There was evidence tending to show this, but Faison denied the existence of any such agreement.

The other facts necessary to an understanding of the case, as found by the court from the record, are stated in the opinion. The court below decreed in favor of complainants, and defendant, Faison, appeals.

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Opinion of the court.

The view taken by this court of the facts renders it unnecessary to set out the very elaborate briefs of counsel touching the questions of law discussed by them.

Campbell & Starling, for appellant.

W. G. Phelps, for appellees.

Argued orally by *R. B. Campbell*, for appellant, and *W. G. Phelps*, for appellees.

WOODS, J., delivered the opinion of the court.

The principal contention in the court below, as well as here, is addressed to the power of a court of equity to enforce the verbal agreement which, it is insisted by the appellant's counsel, was made to purchase the lands, and re-convey on the subsequent satisfaction of his debt and the defeat of the Porterfield claim, despite and in the face of our statute of frauds. This serious question, with every other presented, and the voluminous record also in the case, has been protractedly examined. But, in the view which we take of another question, lying before this principal one, we find it unnecessary to make any decision of the latter.

Under the indisputable facts of the case, and under the circumstances which marked the three sales by which appellant seeks to defend his title to the lands, must he not, in equity, be held a trustee in possession and accountable to the real owners?

The three sales all were made on the same day, and at the same time and place, and appellant was consecutively the purchaser at each sale. The conclusion is strong that his purpose was to concentrate all titles, from all sources, in himself, and to fortify himself against attack.

The execution sale could, in no event, have been made of more than the undivided interest in the lands of Frank Johnson. N. E. Johnson, the other judgment debtor, had

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long been dead, and there had been no revivor against her heirs. The whole estate in the lands put up, was, however, sold, and the value of the equity of redemption, under the trust-deed, was thus practically destroyed an instant before the same lands, and others, were offered for sale under the trust-deed. The execution sale of the interests of the heirs of N. E. Johnson was without authority in law, and must be declared void in any direct proceeding instituted by the heirs for that purpose. If the purchase at the execution sale were dissociated from the other sales, and were otherwise unobjectionable, the appellant might successfully defend as to the undivided interest of Frank Johnson. But, under the circumstances attending all the sales, we hold that even this undivided interest was improperly sold, and that the heirs of N. E. Johnson are entitled to have his title to that claimed under the execution sale also declared void.

The sale made under the trust-deed was made immediately after the sale under execution. We have already seen that the equity of redemption in all the lands included in the sale under execution had been practically destroyed by the course of the judgment creditor, whereby these appellees suffered wrong. But, in addition, it is clear to our minds that the sale under the trust-deed conferred on appellant no title, other than that of trustee for appellees, for the excellent reason that the debt due appellant, and secured by the trust-deed, had actually been satisfied in large part, if not wholly, before this sale was made under it; and this the appellant knew, or should have known; but this the appellees did not know, and only first knew from the disclosures made in appellant's answer to their bill of complaint, and in the exhibits filed therewith. A sale, under which appellant asserts title, was made for a debt already paid, and appellant bid nearly $3,000 for the lands (about $1,000 more than was due him on the note secured by the trust-deed, as now perfectly appears, even on his own theory and on his own showing), and yet paid not a single dollar of the purchase-price. That

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this sale is voidable by the heirs of N. E. Johnson is too plain to admit of disputation.

The tax-sale fails also to invest appellant with the real title. This sale was made with the other sales which we have considered. It was made to be part and parcel of the scheme to concentrate all titles in appellant, and to fortify them there. But, by appellant's own books of account, no dispassionate mind can fail to be convinced that, before this tax-sale took place, the appellant had charged into the general open account (exhibit 11 to answer) the large sum necessary to pay the taxes for which he permitted the land to be sold. It is certain that he had put himself under the duty of paying these very taxes, and the proof of this is found in an entry on his account-book made several days before the tax-sale. He himself affords the evidence of his having permitted the lands to be sold for taxes unpaid, when he was responsible for the delinquency.

On these facts, and under these circumstances, a court of equity must hold that the appellant is trustee in possession for the appellees, and he is to be treated and held to account in the same manner and to the same extent as other trustees under ordinary circumstances.

The correct result was arrived at in the decree of the court below, and the same is accordingly

Affirmed.

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RICHARDSON ET AL. v. E. V. DAVIS ET AL.

1. ASSIGNMENT. *Preferring debt to former partner.*

Where there is an actual dissolution of a mercantile firm, one of the partners buying the interest of the other, giving a note therefor, and he afterwards fails, and makes an assignment, preferring this debt, creditors cannot defeat the assignment on the ground that there was no notice of the withdrawal, and that, therefore, the retiring partner being personally liable to them, it would be a fraud on their rights to permit the assets thus to be devoted to the claim of the retiring partner.

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Statement of the case.

2. SAME. *Debt for money loaned former partner.*

This is true also of a debt for money loaned by the retiring member to his former partner after the withdrawal, it being likewise preferred in the assignment.

3. SAME. *Dissolution inter sese. Right of former partner.*

That the retiring partner, by failing to give notice, may have become personally liable for the payment of the debts subsequently contracted in the business, does not make him in fact a partner, and in no way affects the validity of the claims due him or the right of the former partner to prefer them in an assignment of the previous firm assets.

4. CHANCERY PRACTICE. *Charges of fraud. Evidence confined to issue.*

Creditors attacked an assignment, averring that certain debts therein preferred were simulated, and were inserted for the purpose of defrauding them. They also alleged generally that the assignment was fraudulent and void. The allegations were denied. The chancellor at the hearing decreeing for defendants, declined to consider any evidence of fraud other than that relating to the genuineness of the preferred debts, although there was no objection to the introduction of testimony. *Held*, proper. *Railroad Co.* v. *Neighbours*, 51 Miss., 412.

FROM the chancery court of Noxubee county.

HON. T. B. GRAHAM, Chancellor.

In 1889 E. V. Davis and W. E. Whitten were engaged in mercantile business at Stone, Ala., under the firm name of E. V. Davis & Co., and complainants in this case, wholesale merchants, had dealings with the firm. Davis was the active manager of the business, but it was known to complainants that Whitten was a partner. In January, 1890, Davis purchased from Whitten his interest in the business, giving in payment therefor his note for $1,000. He afterwards borrowed from Whitten $500, for which he also gave his note.

Davis continued the business, and during the year 1890 contracted the debts sued for by complainants herein. About the first of October, 1890, the business was removed to Shuqualak, Miss., and was there conducted under the firm name of E. V. Davis & Bro. On the 9th day of February, 1891, the said E. V. Davis executed a general assignment of all his property, including the stock of merchandise, in which were

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Statement of the case.

some of the goods purchased from complainants. A. J. Davis joined in the execution of this assignment, reciting therein that the firm of E. V. Davis & Bro. was composed of E. V. Davis and himself, and that he was a mere nominal partner having no interest.

In this assignment the above mentioned debt of $500 in favor of W. E. Whitten, or rather W. E. Whitten & Co., was preferred, as was the debt of $1,000, which was then owned by E. C. Dancy.

On February 13, 1891, the bill in this case was filed for the purpose of vacating the assignment. Complainants alleged that they were creditors of the firm of E. V. Davis & Co., composed of E. V. Davis and W. E. Whitten; that the said E. V. Davis, pretending to own the stock of goods, and intending to hinder, delay and defraud complainants, executed said assignment; "that neither the firm of E. V. Davis & Bro. nor E. V. Davis & Co. nor E. V. Davis were indebted in any sum whatever to the said W. E. Whitten, or to the said E. C. Dancy, but that the said pretended indebtedness to both W. E. Whitten and to the said E. C. Dancy are fictitious, simulated and fraudulent, and were inserted in said assignment for the sole purpose of defrauding these complainants and other creditors of their just demands; . . . that said assignment was intended simply as a means to defraud these complainants and other creditors;" that the said W. E. Whitten is insolvent; that the property assigned is of the value of only $1,500 or $2,000, and that the only means complainants have of collecting their debts is out of said property.

The above are all the allegations of fraud contained in the bill.

The defendants answered, denying all the material allegations of the bill upon which the right to relief was predicated. They specially denied the allegations of fraud, and averred that Whitten was not a partner of E. C. Davis; that there was a dissolution in January, 1890, and that the preferred debts were genuine, and were due from said E. V. Davis.

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Brief for appellants.

Evidence was taken at great length, and, on final hearing, a decree was entered in favor of defendants from which this appeal was taken. The evidence showed that Davis assumed and paid off all the debts of the firm existing at the time of the dissolution. There was some controversy as to whether the debts subsequently contracted, as to which complainants sought relief, were contracted in the name of E. V. Davis & Co., or in the name of Davis alone. There was also controversy as to whether complainants, before their debts were contracted, had notice of Whitten's withdrawal. This question seems not to have been expressly passed upon by the court below.

There was no objection to testimony in the court below on the ground that the issue, as to fraud, was confined to the validity and genuineness of the preferred debts, and that testimony in support of other grounds of attack was irrelevant; but the chancellor, in his written opinion, made a part of the record, stated that he considered only the evidence in support of the allegations of fraud, touching the genuineness of said debts. The opinion contains a further statement of the case.

Rives & Rives, for appellants.

1. Appellants were creditors of the firm of E. V. Davis & Co., composed of Davis and Whitten, and the assignment is void, because it is an attempt by one of the partners to prefer a debt pretended to be due the other.

Having failed to give notice of his alleged withdrawal, Whitten is liable to complainants. As to them, he is a partner. *McLemore* v. *Rankin Mfg. Co.*, 68 Miss., 196; *Polk* v. *Oliver*, 56 *Ib.*, 566; *Eckerly* v. *Alcorn*, 62 *Ib.*, 228.

As to complainants, Whitten, being a partner, he could not be preferred for any amount. *Gadard* v. *Hopgood*, 60 Am. Dec., 272; *Vankleeck* v. *Hammell*, 24 Am. St. R., 182; Burrill on Assignments, 109, and authorities cited.

2. The chancellor should have considered all the evidence

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of fraud. The bill contains a general allegation of fraud. Mere circumstances need not be averred. Waite on Fraud. Con., § 142; Story's Eq. Pl., § 28. The *intent* to defraud was the main fact, and that was charged. It was competent to support this by evidence of circumstances.

3. But the cause proceeded to a hearing on the general charge of fraud, and the evidence was *read without objection*. It was too late for objections as to relevancy to be considered when the final decree was entered. If objection had been made in time, complainants could have easily amended the bill. We therefore ask the court to consider all the evidence of fraud, and we submit that the decree should be reversed.

A. C. Bogle, for appellees.

1. The proof of dissolution is clear. Davis assumed and paid all the existing debts of the firm, and Whitten withdrew. Even if it be conceded that he is liable to complainants personally, on the ground that they had no notice of his withdrawal, that would not change the fact of dissolution, and make him a partner. One may be liable to creditors as though he were a partner, and, at the same time, have no interest in, or connection with, the business. Counsel for appellants fail to recognize the distinction applied by the chancellor. The authorities cited by them refer to cases where there is an actual partnership, and an effort to prefer the debt of a partner. They have no application to this case.

2. The only allegation of fraud was that the preferred debts were fictitious and simulated. This was denied, and clearly overturned. The testimony took a wider range, but all of it outside of the issue was incompetent. Courts can only decide issues made by the pleadings.

COOPER, J., delivered the opinion of the court.

The evidence abundantly establishes the fact that Whitten sold to his partner, Davis, his interest in the firm of Davis & Co., and accepted in payment therefor the note of Davis

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Opinion of the court.

for $1,000, which he afterwards transferred to Dancy. It also appears that Whitten afterwards loaned to Davis $500, taking his note therefor. These are the debts preferred in the assignment, and which are attacked as simulated and fraudulent by complainants.

We are unable to appreciate the process of reasoning by which it is sought to be proved that these debts, certainly and confessedly due from Davis to Whitten, became simulated and fraudulent, simply because Davis, by his assignment, attempted to provide for their payment.

It may be true that Whitten is liable to those who gave credit to the firm of which he had been a member, after his withdrawal from it, because he failed to give notice of its dissolution. But this would not operate to discharge the debts Davis owed Whitten, nor re-create the partnership between them.

The good faith of the sale by Whitten to Davis is not denied. That transaction is not assailed; but counsel insist that if Whitten was bound to complainants for the debts contracted by Davis after the dissolution of the firm, it is because, as to them, he is still to be treated as a partner, and that, if, as to complainants, Whitten is still a partner, the assignment has devoted partnership assets to the payment of a debt due one of the partners.

The fallacy of the argument is in assuming that the creditors of Davis and Whitten (if Whitten was liable) or Whitten, had some interest in the property of Davis, because of Whitten's liability. If mere liability to third persons as a partner created a partnership *inter sese*, the argument would be sound. But one is not a partner simply because he is bound to third persons as such.

The property assigned was that of Davis, and he owed the debts preferred to Whitten or his assignee, and the assignment was properly declared valid by the chancellor.

Other grounds of attack are argued, but, by the pleadings, the issue was confined to the question of the genuineness of

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Statement of the case.

the debts to Whitten and Dancy, and the right of Davis to prefer them. The chancellor rightly declined to consider the evidence introduced to attack the assignment on other grounds. *Railroad Co.* v. *Neighbours*, 51 Miss., 412.

Affirmed.

YALE & BOWLING *v.* JOSEPH BAUM ET AL.

INJUNCTION. *Dissolution. Dismissal without prejudice. Effect.*

The dismissal of an injunction suit at the hearing operates as a dissolution of the injunction, and entitles the obligees in the injunction bond to sue for a breach thereof. In such suit the decree of dismissal, though made "without prejudice," is conclusive evidence that the injunction was wrongfully sued out.

FROM the circuit court of Lauderdale county.

HON. S. H. TERRAL, Judge.

Appellants, Yale & Bowling, sued out an attachment against L. Solomon & Co., which was levied on certain goods. Joseph Baum & Co. claimed to have purchased the goods, and obtained an injunction restraining the plaintiffs from subjecting them to their attachment. The injunction suit was heard on pleadings and evidence, and a decree was entered therein dismissing the bill, "without prejudice to either party." Thereupon this action was brought by appellants against Baum & Co. and their sureties on the injunction bond, to recover damages for the wrongful suing out of the injunction. The plaintiffs, at the trial, offered in evidence the bond and proceedings in the injunction suit, including the decree of dismissal, besides other testimony in support of their demand. Defendants contended that, inasmuch as the decree of dismissal was without prejudice, they were not concluded thereby, but were entitled to show that the goods were not liable to plaint-

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Brief for appellees.

iff's attachment, and that the injunction was rightly sued out. Much evidence was offered in support of this contention. The court gave to the jury a peremptory instruction to find for defendants, and judgment was rendered accordingly. Plaintiffs excepted and appealed.

Among other things, the plaintiffs in the court below proved that a reasonable fee for the services of their solicitor in defending the injunction suit was $125. It appeared that no motion was made to dissolve the injunction, but that the case was heard on pleadings and evidence, when the decree of dismissal was entered.

As the opinion of the court is confined to only one point, it is not deemed necessary to make any further statement of the case.

Miller & Baskin, for appellants.

The effect of the decree of dismissal was to dissolve the injunction, thereby declaring that it was wrongfully sued out. According to the undisputed testimony, appellants were damaged by suing out the injunction, and were entitled to recover therefor. As to the right to recover for attorneys fees in defending the injunction suit, see *Baggett* v. *Beard*, 43 Miss., 120.

N. C. Hill, on the same side.

The court erred in giving a peremptory instruction in favor of defendants. They were estopped by the decree of the chancery court dismissing their bill and dissolving the injunction. No evidence should have been admitted to show that they were not liable.

McIntosh & Williams, for appellees.

1. The bill in the chancery case being dismissed without prejudice, all matters involved in that suit could be litigated in this. *Railroad Co.* v. *Davis*, 62 Miss., 271; *Ragsdale* v. *Railroad Co.*, *Ib.*, 480. It was shown that appellants were not entitled to subject the goods to their attachment.

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Syllabus.

2. As no motion was made to dissolve the injunction, and as the chancery suit was finally heard on its merits, appellants were not entitled to recover attorneys fees for the dissolution. High. on Inj., § 1686. In no view of the case were plaintiffs entitled to recover.

COOPER, J., delivered the opinion of the court.

The dismissal by the chancery court of the suit by Baum & Co. against the appellants and others, though made without prejudice, operated as a dissolution of the injunction, and entitled the obligees in the injunction bond to sue for its breach.

It is too late for the appellees to say that the injunction was rightly sued out; that it was not, is conclusively settled by the decree dissolving it.

Judgment reversed.

Judge Woods takes no part in this decision.

WINSTON JONES, ADM'R, v. AMANDA L. WARREN ET AL.

1. WITNESS AGAINST ESTATE. *Code* 1880, § 1602. *Surviving partner as witness.*

On exceptions to the account of an administrator, a surviving partner of the intestate is a competent witness to prove the correctness of an open account in favor of the partnership against the deceased partner, which had been paid by the administrator on an accounting. He is not testifying to establish his own claim against the estate within the meaning of § 1602, code 1880. *Gordon* v. *McEachin*, 57 Miss., 834.

2. ESTATE OF DECEDENT. *Administration in two states. Domicile of assets.*

Where an estate in this state and in Alabama consists in part of decedent's half-interest, as partner in a mercantile firm in this state, and administration is taken out in both states, the balance due to decedent on an accounting of the partnership assets is properly payable to the Mississippi administrator, although deceased lived in Alabama and the accounting was had and money paid in that state.

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Statement of the case.

3. SAME. *Administration in this state. What to embrace. Case.*

Where, on such accounting, the administrator, who is administrator in both states, paid the surviving partner of the Mississippi partnership an account due to it by the deceased partner, and then collected and charged to himself, as administrator in this state, the decedent's half of the partnership assets, thus augmented, he should be allowed in his administration in this state for the account so paid; and this, notwithstanding the account was for supplies furnished for decedent's use in Alabama, and the administrator had sought to obtain credit for the amount in his administration in that state.

4. ESTATE OF PARTNER. *Accounting. Limitation. Code* 1880, § 2206.

Said account on the books of the partnership against the deceased partner is not a claim against his estate required to be probated and registered under § 2206, code 1880; nor, before an accounting of the partnership assets, is it subject to the statute of limitations.

FROM the chancery court of Noxubee county.

HON. T. B. GRAHAM, Chancellor.

In April, 1889, S. G. Coleman, a citizen of Alabama, resident in Mobile, died in that state intestate and unmarried. At the time of his death he owned a large landed estate, consisting of plantations in Alabama and Mississippi, and one plantation lying partly in Noxubee county, Mississippi, and partly in Pickens county, Alabama. He owned also a half-interest, as partner, in two stores—one in Noxubee county, in this state, conducted under the name of Coleman & Cole, and the other in Pickens county, Ala., under the style of Coleman & Spann. The latter firm furnished the supplies needed to equip and carry on the said plantation that lay in both states. Both firms, as well as Coleman individually, did business and kept accounts with Winston Jones & Co., commission merchants in Mobile, Ala., and, at the time of Coleman's death, each firm had a large balance to its credit in the hands of Winston Jones & Co. Troy Cole, surviving partner of the firm of Coleman & Cole, also had an account with said commission merchants.

Soon after the death of S. G. Coleman, Winston Jones, senior partner of the firm of Winston Jones & Co., upon

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petition of the heirs, was appointed administrator of his estate, taking out letters of administration in Mobile county, for Alabama, and in Noxubee county, for Mississippi. He at once took charge of the assets of the estate in both states, except such as belonged to the partnerships of Coleman & Spann and Coleman & Cole. These were left to be settled by the respective surviving partners.

In April, 1890, said administrator had a settlement in Mobile, Ala., with Troy Cole, surviving partner of the firm of Coleman & Cole. The individual account of Cole with his firm showed an indebtedness to it of about $500, while the individual account against Coleman on the books of the firm showed an indebtedness of $1,193.85, being mainly for supplies from said firm to a plantation owned by Coleman in Pickens county, Ala. Both the estate of Coleman and the partnership were amply solvent. The settlement was made in the following manner: The account of Cole with Coleman & Cole was charged to his individual account on the books of Winston Jones & Co., and the account of Coleman & Cole credited with a like amount. The amount of Coleman's indebtedness by account to Coleman & Cole, Jones charged to himself, as administrator of Coleman in Alabama, and credited it on the account of Coleman & Cole. The cash assets of said firm, thus augmented by payment of these two items, were equally divided between Cole, the surviving partner, and Jones, as administrator, the latter charging himself with the amount, as administrator in the state of Mississippi.

Subsequently, Jones, as administrator in Alabama, filed his account in the probate court of Mobile county, Ala., in which he showed this debit of $1,193.85, paid out in settlement with Cole. He also filed his account, as administrator in Mississippi, in the chancery court of Noxubee county, in which he charged himself with the amount received as assets from the firm of Coleman & Cole. Soon after the account was filed in Alabama, some of the heirs of Coleman filed ex-

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ceptions thereto, objecting, among other things, to the allowance of the item of $1,193.85, upon the ground that the account was barred; that it had not been probated, and, even if a proper claim against the estate, it pertained to the administration in Mississippi, and should be allowed out of the Mississippi assets. Thereupon, the administrator obtained leave to amend his account on file in this state, and in April, 1891, filed a petition, asking to surcharge his former account, so as to allow him credit for the item of $1,193.85.

All the heirs of the estate were made parties, and certain of them appeared, and objected to the prayer of the petition, insisting that the account, if not barred, was payable out of the Alabama assets.

Upon the hearing of said petition, the court, after decreeing that the administrator make partial distribution of other sums in his hands, directed the administrator to pay into court the said sum of $1,193.85, and a commissioner was appointed by the decree to state the account of the administrator, and make report to the next term; and he was authorized by the decree to take testimony on the first Monday in August, 1891, continuing, if necessary, from day to day, the testimony to be either oral or by deposition, and, if oral, to be reduced to writing. The commissioner proceeded to take testimony at the time appointed, and, among other depositions, took those of Winston Jones, the administrator, and Troy Cole, which depositions he filed with his report. In his report, the commissioner found that the item of $1,193.85 was a proper charge against the estate in Mississippi in favor of the administrator. His report was excepted to by certain of the heirs, and, along with the exceptions, the heirs moved the court to suppress the depositions of Winston Jones and Troy Cole, because they were incompetent as witnesses against the estate of S. G. Coleman, and because the deposition of Jones was taken without notice. The whole matter was submitted to the chancellor for decree in vacation. The decree, as rendered, finds that the deposition of Jones,

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Brief for appellant.

administrator, was improperly taken, for the reason that no sufficient notice thereof was given; also, that the deposition of Troy Cole should be suppressed so far as it relates to the item of $1,193.85, for the reason that he was an incompetent witness against the estate. The exception to said item in the account was sustained, the decree reciting that it was a proper claim against the estate, but allowable only out of the Alabama assets, and the account was ordered restated in accordance with the decree, and from this decree the administrator appeals.

A. C. Bogle, for appellant.

Cole was not an incompetent witness. He was not testifying to establish his own claim against an estate. The item of $1,193.85 was a liability of Coleman to the partnership of Coleman & Cole. Claims, within the meaning of § 1602, code 1880, are such as exist between parties who sustain the relation of debtor and creditor. The statute has no reference to liabilities between partners on an accounting. *Harris* v. *Hutcheson*, 65 Miss., 9. The relation does not exist until after an accounting. 2 Bates on Part., § 785. Cole was not an adverse party, but a trustee, winding up the partnership. 1 Am. Law of Admn. (Woerner), § 124. Cole had no claim to establish. His interest in the partnership was not even represented by that item, but was ten times as much. He could not have probated it as a claim until there had been an accounting. See *Love* v. *Stone*, 56 Miss., 449; *Combs* v. *Black*, 62 *Ib.*, 831.

For a like reason, the statute of limitations has nothing to do with the case, it being a matter of liability between partners on an accounting. 60 Wis., 373.

The deposition of Jones was improperly suppressed. The decree fixed a time for beginning the taking of depositions, and provided for continuing from day to day. The appellees were parties to the decree, and had ample opportunity to be present.

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Opinion of the court.

The ruling of the court, in disallowing the credit of $1,193.85, was extremely technical. It finds that it is a just and proper charge against the estate, but that it ought to be carried into the administration in Alabama. Clearly, this was wrong. The amount with which the administrator had charged himself in this state, as received from Coleman & Cole, was augmented by this very item. It was proper to adjust it along with the assets of that firm. Besides, all the parties in interest were before the court, and it had full jurisdiction to decree what was equitable between them. If our court rejects the item as properly allowable only in Alabama, and the courts of that state reject it because allowable only in the administration here, the administrator will be mulcted for a large sum that is admittedly a just charge against the estate. Having jurisdiction for some purposes, our court may grant full relief, and it is its duty to do so. *Brooks* v. *Stally*, 3 McLean, 523.

CAMPBELL, C. J., delivered the opinion of the court.

The record does not show when the deposition of the appellant was taken, nor the circumstances, and, so far as we can discover, there was no ground for suppressing it. The motion to suppress states that it was taken October 24, 1891, without legal notice, while the report of the commissioner shows that it was taken at some time in pursuance of the commission opened by him under the decree of the court. It may have been rightly suppressed because of the circumstances under which it was taken, but we cannot say as to this.

The deposition of Troy Cole was not rightly suppressed. He was a competent witness. *Gordon* v. *McEachin*, 57 Miss., 834. His testimony shows satisfactorily that Jones, the administrator, has charged himself, as administrator in this state, with $1,193.85 more than he is chargeable with. The interest of the intestate, Coleman, in the partnership assets of Coleman & Cole constituted Mississippi assets. What

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was due to Coleman, the deceased partner, on settlement of partnership matters, was payable by the surviving partner, Cole, to the Mississippi administrator. It was paid to him on a settlement made in Alabama. But, although paid in Alabama, it was to be accounted for in Mississippi, and the administrator is chargeable only with the sum received by him from Cole, as the sum due Coleman of the assets of Coleman & Cole, after adjusting all matters between them as partners.

The statute of limitations, and other statutes invoked, have nothing to do with the case. The only question is, with what sum is the administrator chargeable, by reason of his receipt from Cole of the share of Coleman in the partnership assets of Coleman & Cole?

It seems manifest that he has charged himself with a sum as received on this account which he did not, in fact, receive, and that he is entitled to diminish the debits against him by this much. It seems to us that misunderstanding has resulted from considering the question of paying the $1,193.85 constituting the individual indebtedness of Coleman to Coleman & Cole, whereas, the true question is, how much is the administrator chargeable with, by reason of his receipt from Cole of Coleman's share of the assets of the partnership of Coleman & Cole? To the extent that the administrator, in his account, charged himself with more than he received on settling with Cole, survivor of Coleman & Cole, he should be allowed credit. That this may be ascertained, the decree is

Reversed, and cause remanded.

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Statement of the case.

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WILLIAM BELL v. DONNA M. RUDOLPH ET AL.

1. GUARDIAN'S BOND. *Surety. Release. Past delinquencies. Unauthorized loan.*

As the obligation of a guardian's bond is that the estate of the wards shall be lawfully managed and delivered to them on the termination of the guardianship, a surety thereon, although released by decree of court from further liability, remains liable for loss which results from a prior unauthorized loan of the wards' money.

2. SAME. *Surety not discharged. Case.*

Such surety is not discharged by the fact that the guardian, after making the unauthorized loan of money to her insolvent husband, and its use by him in his business, gives a new bond with the husband as co-guardian, and thereafter, in their accounts, charge themselves with the sum loaned as money on hand.

3. SAME. *Decree on accounting. Effect on surety. Payment.*

Nor is such surety released by the decrees of the court approving such subsequent accounts of the guardian. Nothing but payment can discharge the obligation.

4. ACTION ON BOND. *Limitation. When time begins to run.*

The duty of the guardian to account to the wards is part of the obligation of his bond. Accordingly, before a final accounting by the guardian, the statute of limitations does not run in favor of a surety as against the wards. *Nunnery* v. *Day*, 64 Miss., 457.

FROM the chancery court of the first district of Hinds county.

HON. H. C. CONN, Chancellor.

This is a bill exhibited in behalf of Donna M. Rudolph and others, minors, against their former guardians, and the sureties on two distinct sets of guardians' bonds, to recover a principal sum of about $9,000, which has been lost as the result of an unauthorized loan of their funds.

The facts, as stated by the bill, are as follows: Complainants are children and sole heirs of A. L. Banks, who died intestate in 1876, leaving an unincumbered estate, consisting

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of about $9,000 in money and a small amount of other property, mostly solvent credits. E. E. Banks, the widow, became guardian of complainants, under an order of the chancery court of Scott county, where the deceased had resided, and where the administration was pending, and executed a bond as guardian in the sum of $11,000, with Wm. Bell and N. C. Perry as sureties. Said guardian at once took possession of the estate of her said wards, and among other assets received was the sum of $9,000 in cash, which she deposited in the Capital State Bank, in Jackson, Hinds county, Mississippi, the bank contracting to pay her interest at the rate of eight per cent. per annum. This investment was not authorized by the court, but was made with the consent of Bell and Perry, and under an agreement between the guardian and said sureties that the money should not be withdrawn from the bank or the investment changed without their consent. Soon after this Mrs. E. E. Banks was married to W. W. Ratliff, who was engaged in mercantile business. His business was unsuccessful, and he became very much embarrassed financially, and, while thus involved and insolvent, he persuaded his wife to agree to turn over to him the money on deposit in said bank, but the bank, presumably being aware of the agreement between the guardian and her sureties, refused to permit the money to be withdrawn. Thereupon Mrs. Ratliff, the guardian, agreed with Bell and Perry, her sureties, to give another bond for $6,000, as guardian, and secure their release *pro tanto*, and then withdraw that sum, leaving $3,000 in the bank as a protection to the sureties. The new bond was signed and tendered to the chancery clerk, and accepted subject to the approval of the court. The court, of course, refused to approve the bond thus taken, or to release Bell and Perry in any manner. But, meantime, Mrs. Ratliff, with the consent of Bell, checked out $6,000 from the bank, and a short time afterward withdrew the $3,000 without his consent, and this she loaned, without security and without authority from the court, to her hus-

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band, who used it in his mercantile business. He soon afterwards failed, and made a general assignment, and nothing has ever been realized therefrom for the wards.

As soon as Bell, the surety, heard of the withdrawal of the $3,000 from the bank, and of the refusal of the court to accept a new bond in lieu of the first, he made formal application to the chancery court of Scott county to be released from further liability, and an order was made releasing him from liability for future acts of the guardian as soon as a new bond should be executed and approved. Thereupon, in July, 1881, said guardian gave new bonds, which were approved, and, at the same time, her husband, W. W. Ratliff, qualified as co-guardian, and thereafter they continued to act jointly in the management of the estate of the wards.

The accounts filed by the guardians did not disclose the loan to W. W. Ratliff; but the sum appeared in the accounts as money on hand, and the guardians charged themselves with the same, and interest at the rate of ten per cent.

In 1887, said guardians filed their final accounts, and the sum due by them to each ward was ascertained and directed to be paid over to their successors. The amount due to each ward was more than $4,000.

Another guardian was appointed, but the money found to be due has never been paid, and both E. E. Ratliff and her husband are insolvent, and, moreover, have removed from the state.

This suit has been instituted in behalf of the wards, in the chancery court of the first district of Hinds county, where Bell resides. E. E. Ratliff and W. W. Ratliff, former guardians, have been made defendants, and also Bell and Perry, sureties on the first bond, and W. P. Ratliff and others, who are sureties on the second set of bonds.

Complainants claim that they have the right to elect which set of sureties they will proceed against; that the first bondsmen are liable for the unauthorized act of the guardian in loaning the money to her husband during the life of the first

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Brief for appellant.

bond; and that the sureties on the second bond are liable, because W. W. Ratliff, the borrower of the money, did not become wholly insolvent and fail in business until after the second bonds were executed and approved. In order that an election between the bonds may be intelligently made, complainants pray that the sureties on both make discovery as to their solvency. Discovery was also prayed from the guardians as to all matters which might throw light on the circumstances of the loan to W. W. Ratliff and the use made of the money and assets, and of the exact status of the account at the time the second bonds were given. The bill further prays that the defendants be allowed to interplead with one another, so that a multiplicity of suits may be avoided, and that the court, by one decree, will settle the rights of all parties.

A supplemental bill was afterwards filed, but, as it does not relate to the case between Bell, the appellant, and the complainants, it is needless to set it out. All the defendants demurred to the bill, the separate demurrer of Bell assigning that there was no equity on the face of the bill; that no liability on his part is shown, and that the complainants are barred by the statute of limitations. All the demurrers were overruled, but only Bell appeals.

Calhoon & Green, for appellant.

The ground of relief against appellant is the alleged unauthorized loan of the wards' money during the life of the first bond. It is not averred that the guardian did not charge herself with the amount. The contention is that, notwithstanding the guardian charges herself with a loan as cash, that its investment, without an order of court, is a breach of the bond.

The loan being unauthorized, the statute treats the money as still on hand, and the relation of debtor and creditor between guardian and ward continues. As the guardian remains debtor, the fund is not a specific trust-fund. The bond,

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Brief for appellees.

not the investment, is the security provided, and the investment should not be *pro se* the recourse of the wards. Hence, the guardian remains bound just as before the investment. The loan, made on his own judgment and on his own responsibility, is not a breach of the bond.

The bill seeks to hold both bonds liable; the second bond because Ratliff, the borrower, became insolvent after it was executed. But Ratliff qualified as co-guardian with his wife, and it is not averred that Mrs. Ratliff, as sole guardian, did not make a full accounting.

Bell was not only discharged, but the guardianship for which he was surety terminated, and a new joint guardianship begun. The money was charged in the new accounts as cash. When Ratliff, having the money as borrowed, charged himself with it as guardian, it was legally a payment. See *Crump* v. *Gerock*, 40 Miss., 765. So charging the amount in his accounts is conclusive against the guardian that the money is on hand. *Brown* v. *Barlow*, 51 Miss., 7; *Stone* v. *Morgan*, 65 *Ib.*, 247; *State* v. *Hull*, 53 *Ib.*, 626.

The final decree in Scott county, adjudicating the amount due by the guardian, holds Ratliff and wife liable for the amount so reported as cash. We must presume the court inquired into all the facts, and held that the money was on hand. No decree was rendered against Bell. That decree can be attacked only by a proceeding to surcharge and falsify the accounts. *Jones* v. *Coon*, 5 Smed. & M., 751; Code 1880, § 2075; *Jarnagin* v. *Frank*, 59 Miss., 393.

The suit is barred by the statute of limitations of ten and seven years. If Bell was ever liable, his relation to the trust ended in 1881, when he was discharged, and the sole guardianship ceased, and time began then to run in his favor.

Frank Johnston, for appellees.

1. The unauthorized loan to her insolvent husband by the guardian was *per se* a breach of the bond. It was a conversion of the trust-fund, and *ipso facto* rendered her liable to

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the wards. In the absence of any statute, the English rule was that guardians had no authority to loan the ward's money on any sort of personal security. 1 Cooper, 6; 3 Swanst., 84; Gilbert, Eq., 10; 3 Madd., 40; 2 Cox, 1. Code 1871, § 1217, took all power from guardians to invest the trust-funds, and places this exclusively with the court. Code 1880, § 2105, is substantially the same. The act of lending without the requisite authority is *per se* a *devastavit*. 1 Breese, 14; 111 Ill., 457; 103 *Ib.*, 142; 42 Ala., 473; 4 Fla., 112.

2. The theory that Bell was released because of the *ex parte* proceeding of taking new bonds is untenable. The idea of appellant is that the money was theoretically brought into court, and given to the new joint guardianship, and the obligation of the first bond obliterated. The bill alleges, however, that this was not done.

3. The unauthorized act of the guardian created a liability on the bond, and this was a continuing liability on the sureties, and bound them, although the failure of the borrower's business did not occur until after the second was taken. The fact that Ratliff became co-guardian, made a new bond necessary. The court did not undertake to deal with the subject of the investment.

4. The money loaned to Ratliff does not constitute all the estate; yet the entire estate was wasted. The bill is good, whatever be the law as to liability for the $9,000 loaned.

5. The statute of limitations did not begin to run until 1887, when the decrees on final settlement were rendered, and a new guardian appointed in lieu of Mrs. Ratliff and her husband. *Nunnery* v. *Day*, 64 Miss., 457.

Argued orally by *M. Green*, for appellant, and *Frank Johnston*, for appellees.

COOPER, J., delivered the opinion of the court.

The demurrer of the appellant was properly overruled.

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Opinion of the court.

The obligation assumed by him in becoming surety for the guardian was that the estate of the infants should be lawfully managed by the guardian and restored to them upon the termination of the guardianship. While this obligation was in force, the guardian, without authority of law, loaned the money of the wards to her husband, and it has never been repaid by him. Unless the estate is protected by the bond of the guardian, it has been wasted, and can never be restored to the infants, for Ratliff, the borrower, as well as the guardian, is insolvent. True, the appellant was, upon his petition, relieved from future liability for the acts of the guardian by the decree of the court having jurisdiction of the guardianship, by which a new bond was required, which was afterwards given. But this did not, and could not, relieve the sureties on the first bond from liability for past delinquencies of the guardian; as to those, they continued bound as before.

The final account of the guardian, and the decree of the court thereon, operated to conclusively establish the fact that the guardian was indebted to the wards in the sums for which decrees were made, and gave the right to executions against her for the same. But the decrees are not satisfaction of the demands of the wards. They are but steps in the progress of securing satisfaction, and the obligation of the sureties is that they will pay the sums found due if the guardian does not.

These decrees are conclusive against the guardian, and *prima facie* evidence against the sureties of the amount due by her to the wards. On the facts stated by the bill, and admitted by the demurrer, a large part of the sum now found to be due had been lost to the estate of the minors at and before the decree was made releasing the appellant from the bond. As to this he was then, and ever since has been, bound until the same should be returned to the guardian, or to her successor in the guardianship. This obligation cannot be discharged by the mere admission of the guardian, nor by that together with a decree that she should pay the same

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to the present guardian. Payment alone can discharge the obligation. The statutes of limitation set up by the demurrer are not available to the appellant; the defense rests upon the assumption that time began to run against the wards from the time that the decree was passed discharging the appellant from liability for the future administration of the guardianship. This is an erroneous contention, for, under the obligation of the bond, the guardian was required to account with the wards, which she did not do until she rendered her final account. *Nunnery* v. *Day*, 64 Miss., 457.

The decree is affirmed.

BYRON LEMLY v. THE STATE.

1. SALE OF LIQUORS. *Code* 1880. *Alcohol; not "vinous or spirituous liquor."*

Alcohol is not "vinous or spirituous liquor," within the meaning of chapter 39, code 1880; and prior to the act of 1886 (Laws, p. 35), the statutes in this state relating to the sale of intoxicating liquors did not make it unlawful to sell alcohol.

2. SAME. *Alcohol. Indictment for selling.*

Accordingly, an indictment under the code of 1880, for the unlawful sale of alcohol, charges no offense.

FROM the circuit court of the first district of Hinds county.
HON. J. B. CHRISMAN, Judge.

Appellant, a druggist in Hinds county, has been convicted upon an indictment charging an unlawful sale of vinous and spirituous liquors—namely, alcohol. The "local option" law of 1886 not being in force in Hinds county, the legality of the sale is referable to the general law contained in chapter 39, code 1880. The defense most relied on was that alcohol is not "vinous or spirituous liquor," and its sale not within the prohibition of the said chapter.

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Opinion of the court.

Calhoon & Green, for appellant.

The indictment charges no offense. The word "alcohol" nowhere appears in the legislation of this state on the subject of intoxicating liquors, until the act of 1886. That, by specially excepting the sale of alcohol, assumes that such sale is legal. The sale must be of a beverage. *King* v. *State*, 58 Miss., 737. According to the common understanding of men, alcohol is not classed as an intoxicating beverage. It is not "vinous or spirituous liquor." 34 Ark., 340; 98 N. C., 720; 11 Am. & Eng. Enc. L., 579. See 43 Ark., 155.

C. M. Williamson, on the same side.

It is not denied that the sale was intended by appellant as a sale of medicine, not a beverage. Prior to the act of 1886, the sale of alcohol was not forbidden unless sold and used as an intoxicating beverage. It is not vinous or spirituous liquor. 34 Ark., 340; 98 N. C., 720.

Frank Johnston, on the same side.

T. M. Miller, attorney-general, for the state.

The statute, containing no exception, is against the sale of vinous or spirituous liquors. Spirituous liquor is composed in whole or in part of alcohol extracted by distillation. Therefore, alcohol is spirituous liquor. 2 Humph., 402; 5 Blatchf., 118; 44 N. H., 511.

CAMPBELL, C. J., delivered the opinion of the court.

The indictment does not charge an offense against the law of this state. Alcohol, the subject of the sale, is not *vinous or spirituous liquor* within the meaning of the statutes in force when the sale was made. Alcohol is an ingredient or quality of vinous and spirituous liquor of all kinds, but alcohol, specifically, is neither the one nor the other. It is a distinct thing. It is the intoxicating principle of vinous and spirituous liquors, but is not such liquor in the contempla-

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tion of the statutes adopted in this state prior to March 11, 1886. Those statutes did not employ the terms intoxicating liquors or alcoholic liquors, and the word *alcohol* or *alcoholic* in the statutes first appeared in the act of March 11, 1886 (Laws, page 35), and it draws a distinction between "*alcoholic*" and other liquors in section 6, and, by section 9, makes an exception in favor of "pure alcohol," and authorizes its sale by druggists for certain purposes. This sustains the view that, prior to the act mentioned, alcohol, as such, was not embraced in the terms, *vinous and spirituous*, employed in statutes, and when it was embraced specifically, in terms, by the use of the word *alcoholic*, it was thought proper to authorize its sale by certain persons, for certain purposes. Thus was recognized the marked distinction between the specific thing known as alcohol, and the vinous and spirituous liquors commonly used as beverages, which contain more or less of alcohol, but are not alcohol, although they may be alcoholic. This distinction was just and proper, and exceedingly appropriate to the purpose of the legislation, and the means employed to accomplish it. The purpose was to prevent the evils of intemperance, and the means proposed was the popular vote, by counties, to prohibit, in each county voting for it, the furnishing "*alcoholic, spirituous, vinous, malt* or *intoxicating liquors*," etc. It was thus proposed to exclude, as far as possible, the use of all intoxicating drinks, by preventing their being sold or otherwise furnished. But, as alcohol is not in common use as a beverage, as it is used for altogether different purposes, it shall not be prohibited entirely, but may be sold by licensed druggists for purposes named. This was an intelligent recognition of the difference between alcohol and other liquors, and of the propriety of making provision for obtaining it by those wanting it for proper uses.

It was doubtless well known that alcohol was not a drink, and that it was kept by druggists for their own use, and to sell to others desiring it, not to use as a beverage, but for

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useful purposes. It was probably known that no saloon or bar or dram-shop keeper ever dispensed alcohol to a customer, and that this article was never kept by such establishments, because it was not in their line of trade, and belonged chiefly, if not exclusively, to druggists. Hence, the provision on the subject of its sale. If it be true that alcohol may be diluted and sweetened, and made palatable as a drink, and that therefore it might be made a means of intemperance, surely, it must be true that little or no demand would exist for it to be used as a beverage, if vinous and spirituous liquors, as commonly understood, could be had. It may be assumed that alcohol would rarely, if ever, be wanted for drinking purposes, if supplies of the ordinary potations could be had.

These observations are intended to show the legislative understanding in framing the act of 1886, and to draw from this support for the declaration made in the beginning of this opinion, that alcohol is a thing distinct from the vinous and spirituous liquors, the sale of which was regulated by legislation from time to time in the history of the state.

The act of 1822 on the subject was for the "*restraint of tippling-houses;*" that of 1839 was for the "*suppression of tippling-houses, and to discourage and prevent the odious vice of drunkenness.*" This was followed by the act of February 22, 1842, which laid the basis of the system of licensing the sale of vinous and spirituous liquors, which has since prevailed with few changes. The purpose of each act on the subject was to restrict, and, as nearly as could be without prohibition, to suppress the "odious vice of drunkenness," and therefore the "vinous and spirituous liquors" commonly used as beverages were included in the statutes, and none other was. Alcohol was not included, and, prior to 1886 and under the former laws, it was not an offense to sell alcohol. The act of March 11, 1886, was not in force when the sale charged in the indictment was made in Hinds county, and the general law contained in the code of 1880 was in force, under which it was not unlawful for anybody to sell alcohol.

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Brief for appellant.

These views find support in the books (11 Am. & Eng. Enc. L., p. 579, and citations), but they do not need any other support than an intelligent and unprejudiced consideration of legislation in this state on the subject of the liquor traffic.

Judgment reversed, indictment quashed and the defendant discharged.

BIRD WARD v. THE STATE.

1. CRIMINAL LAW. *Enticing away "laborer." Cropper. Act* 1890.

One hired to work land for a part of the crop, is a "laborer," within the meaning of chapter 56 (Laws 1890, p. 69), making it unlawful "to entice away, knowingly employ or induce a laborer" to leave his employer before his contract has expired, without the employer's consent.

2. SAME. *Indictment. Evidence. Consent of employer.*

The absence of such consent by the employer is a necessary ingredient of the offense, and must be averred in the indictment and proved. *Craft's Case.* Walker, 409; *Kline's Case,* 44 Miss., 317; *Thompson* v. *State,* 54 *Ib.,* 740.

FROM the circuit court of Lee county.

HON. LOCK E. HOUSTON, Judge.

Bird Ward has been convicted under chapter 56, laws 1890, of knowingly enticing away a laborer under contract to work for another. The evidence showed that the laborer was what is usually known as a "cropper"—that is, he worked land of another under a contract that he was to receive a certain share of the crop raised. The case is further stated in the opinion.

J. L. Finley, for appellant.

A cropper is not a tenant or an employed laborer, within the meaning of the act of 1890.

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Opinion of the court.

There is no evidence that the landlord did not consent. The verdict is not warranted by the evidence.

T. M. Miller, attorney-general, for the state.

COOPER, J., delivered the opinion of the court.

A cropper is one who is hired to work land, receiving for his compensation a part of the crop. He is not a tenant; he has no estate in the land, but receives his share of the fruit as the price of his labor. 4 Am. & Eng. Enc. L., 887.

Such person is a laborer within the meaning of chapter 56 of the laws of 1890, by which it is made unlawful "to entice away, knowingly employ or induce a laborer or renter who has contracted with another for a specified time, to leave his employer or the leased premises, before the expiration of his or her contract, without the consent of the employer."

But the evidence is insufficient to support the conviction. It is essential that the prohibited act shall have been "without the consent of the employer;" the absence of such consent is a necessary ingredient of the offense, and must be charged in the indictment and proved as laid. *Craft's Case*, Walker, 409; *Kline's Case*, 44 Miss., 317; *Thompson* v. *The State*, 54 *Ib.*, 740.

Though the employer of the laborer charged to have been enticed away by the defendant was examined as a witness, no proof was made that he did not consent to the act of the defendant.

Judgment reversed.

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Statement of the case.

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SIDNEY SCOTT v. THE STATE.

1. CRIMINAL LAW. *Fatal defects of record. Habeas corpus.*

Although mere irregularities or reversible errors in the proceedings before conviction cannot be availed of by *habeas corpus*, it is otherwise, if it be plainly manifest of record that, because of radical and incurable defects, the verdict and judgment are nullities.

2. VOID CONVICTION. *Jury of eleven. Record. Parol evidence.*

Where the record of a conviction in the circuit court recites that the accused was tried by a jury, whose names are given, and only eleven names appear, the conviction is void, and parol evidence is inadmissible to show that the trial was by twelve men, and that by a clerical error the name of one was omitted.

3. HABEAS CORPUS. *Judgment. Void conviction.*

While the accused is entitled to relief by *habeas corpus* as against such a judgment, he will not be discharged, but will be held for another trial on the same indictment.

APPEAL from the judgment of HON. J. D. GILLAND, Circuit Judge, on *habeas corpus*.

The opinion states the case.

Pegram & Banks, for appellant.

Since the record affirmatively shows that the jury consisted of only eleven men, the relator was entitled, under the constitution, to his discharge.

T. M. Miller, attorney-general, for the state.

The writ of *habeas corpus* cannot be made to serve the purpose of a writ of error. Freeman on Judgments, 620.

On appeal, in the absence of a showing to the contrary, and since it is not necessary that the names of the jurors should be set out, it will be presumed that the enumeration of only eleven names was a clerical error. Code 1880, § 1433. The effect of this statute is a presumption that all things

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were rightly done. *Ex parte Phillips*, 57 Miss., 357; *Spivey* v. *State*, 58 *Ib.*, 743.

WOODS, J., delivered the opinion of the court.

The petition of relator avers that he is in the custody of the sheriff of Warren county, who holds him as the agent of the keeper of the state prison, and to whom said sheriff is about to deliver him, to undergo imprisonment pursuant to the judgment of the circuit court of said county, and that such judgment is a nullity because relator says it was founded upon a verdict rendered against him by eleven men.

The return of the sheriff, amongst other matters showing his authority for relator's detention, states that the judgment of said circuit court (meaning the record of said court) shows that the relator was tried by eleven jurors, but that this seeming irregularity was a clerical error on the part of the clerk of the court, who omitted the name of one juror in making his entry of the names of the jury selected and sworn to try the issue between the state and the defendant, on a charge preferred of burglary and larceny.

On hearing before the judge, at chambers, the records of the court were produced, and it affirmatively and conclusively appeared that a jury of eleven men, whose names are set out in the record, tried the issue and rendered a verdict against the defendant, and that upon this conviction the judgment of the court was pronounced. The state was then permitted to introduce the clerk of the court, who testified, over relator's objection, that the said jury was composed of twelve men, but that the name of one, giving it, was omitted from the record by a clerical error.

The relator was remanded to the custody of the sheriff to undergo the punishment prescribed in the judgment pronounced against him, and from this action of the judge he appeals.

There can be no controversy as to the soundness of the doctrine that "errors or irregularities in proceedings behind

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the judgment cannot be inquired into on *habeas corpus*, and that the writ of *habeas corpus* was never designed to be a writ of error, by which to revise final judgments." The difficulty arises, not in the statement of the general rule, but in its application to particular cases. Mere reversible error will not be examined into on *habeas corpus*, and the party must be driven to his direct appeal, the proper mode for the rectification of irregularities. But, for incurable, radical, fatal defects, plainly and indisputably manifest of record, relief should be granted, even on *habeas corpus*.

The error complained of is incurable by any supplementary oral proofs. It is not an irregularity merely. It is not an omission of a fact from the record which presumption may be invoked to supply. It is a fatal defect, affecting the jurisdiction of the trial court. The constitutional right to trial by twelve men must be secured to every defendant, and a verdict by six men, or eleven men, is absolutely void; and a judgment founded on such nullity must necessarily be itself a nullity. The court undoubtedly had jurisdiction of the person of the relator, and of the subject-matter, and ordinarily no other questions will be considered on *habeas corpus*. But in the present instance we see indisputably that by the intervention of an unauthorized agency, whereby the defendant's guilt of the crime laid to his charge was established, the jurisdiction of the court was broken and lost. There was no power to pronounce judgment, because there was no verdict of guilt on which to base it. In our view, the relator stands just as if he had not been tried at all. The verdict is a nullity, and the judgment upon it is a nullity.

The judgment below will be reversed, but the prisoner will not be discharged. He has not yet been tried, and will therefore be remanded to the custody of the sheriff of Warren county, to be held to answer the charge of burglary and larceny originally preferred against him.

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Brief for appellant.

MONROE SUDDUTH *v.* THE STATE.

CONCEALED WEAPONS. *Threatened attack.* *Code* 1880, § 2985.

One threatened with an attack, may, under § 2985, code 1880, lawfully carry a concealed weapon, although the attack be not threatened to be made at a particular time or on a particular occasion.

FROM the circuit court of Attala county.

HON. C. H. CAMPBELL, Judge.

Appellant has been convicted, under code 1880, § 2985, of carrying a concealed weapon. There was evidence tending to show that, shortly before the occasion when the weapon was being carried, persons had warned the accused that a neighbor had threatened to kill him "on sight," unless he denied making certain statements, which the accused, as a witness, admitted he had made.

The second instruction, as asked by the accused, announced the right to carry the concealed weapon, if the accused "had been threatened with violence, and had notice of such threats, and from them apprehended an attack." The court modified the instruction by adding after the word "attack," the words "at the time." This modification presents the single question passed on by the court.

Dodd & Armistead, for appellant.

The only reasonable construction of the second instruction, as modified, is, that one threatened with an attack may not carry a concealed weapon, unless he is threatened with an attack at a particular time. At least, the instruction is misleading.

It is only necessary to show that accused has been "threatened with an attack." *Tipler* v. *State*, 57 Miss., 685; *McGuirk* v. *State*, 64 *Ib.*, 209.

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Syllabus.

T. M. Miller, attorney-general, for the state.

The second instruction, by its modification, merely announces that accused must be under threats of violence at the time the weapon is carried. It cannot fairly be construed into requiring that there must be a threat of an attack to be made on a particular occasion. "At the time," conveys the idea of a recent and impending threat.

COOPER, J., delivered the opinion of the court.

The second instruction asked by the defendant was correct as prayed, and should have been given.

The modification by the court, by inserting the words "at the time," was calculated to mislead the jury, by permitting them to infer that one threatened with an attack may not lawfully carry a concealed weapon, unless he has reason to believe that, upon the particular occasion, or at the particular time, as distinguished from other occasions or times, he will be attacked.

One must be threatened with an attack to justify the carrying of a concealed weapon, but it is not necessary that he shall anticipate the attack at a particular time or on a certain occasion.

The judgment is reversed.

SHERMAN LLOYD v. THE STATE.

EVIDENCE. *Declarations. Res gestæ.*

On a trial for assault with intent to murder, it is error to admit, as part of the *res gestæ*, the statement of the prosecuting witness as to who shot him, made in the absence of his supposed assailant, the accused, to persons who reached him a few minutes after he was wounded. *Mayes v. State*, 64 Miss., 329.

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Brief for the state.

FROM the circuit court of the second district of Hinds county.

HON. J. B. CHRISMAN, Judge.

In view of the opinion, it is necessary to state the case in only one aspect. Appellant, Sherman Lloyd, and another were jointly indicted for shooting, with intent to kill and murder, one Green Lloyd. A severance was had, and the defense made by appellant was an alibi. Green Lloyd, the wounded man, was the only eye-witness of the shooting. He testified that while going, at night, along the public road, he was fired upon by some one from the roadside, whom he recognized as Sherman Lloyd. After being shot, he ran some distance and fell. Attracted by his cries, his wife and mother-in-law, who were one or two hundred yards away, came to him where he had fallen in the road, and soon they were followed by others who lived near the scene of the shooting. It was shown that the accused, among others, afterwards came and assisted in carrying the wounded man home. The latter testified that he did not then, in the presence of the accused, charge him with the deed, and gave as a reason for his silence that he was advised not to say any thing to him. Thereupon the court asked him if, when persons first came to him, he had told anybody who shot him, and he answered that he told his mother and mother-in-law that Sherman had shot him. This examination was excepted to by the defendant, and is assigned for error.

Defendant was convicted, a motion for new trial was overruled, and he was sentenced to five years in the penitentiary, and from that judgment appeals.

H. Peyton and *R. N. Miller*, for appellant.

T. M. Miller, attorney-general, for the state.

The declarations were admissible to explain the silence (otherwise unaccountable) of Green Lloyd, as to who had shot him.

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Statement of the case.

COOPER, J., delivered the opinion of the court.

The court erred in admitting evidence of what the injured person, Green Lloyd, said to his wife and mother-in-law when they first reached him after he had been shot, as to who had shot him. It was not a part of the *res gestæ*. *Mayes* v. *State*, 64 Miss., 329.

Judgment reversed, and a new trial awarded.

JOHN WHITE *v.* THE STATE.

1. ARREST WITHOUT WARRANT. *Fresh pursuit. Code* 1880, § 3026.

Where a burglary is committed at night, and, being discovered the next morning, an officer and others immediately follow, and, shortly coming upon the felon in hiding, he flees, and is followed, this is a fresh pursuit within the meaning of § 3026, code 1880, and a warrant for the arrest is not necessary.

2. SAME. *Resisting arrest. Homicide. Self-defense.*

In such case, where the fugitive, being followed, is commanded by one of the pursuers, who is in advance of the officer, to surrender, and he refuses, and, when overtaken, kills such pursuer, who, at the time, presents a pistol, and seeks to arrest him, he is guilty of murder, and cannot invoke the doctrine of self-defense.

3. SAME. *Cause of arrest. Showing commission of felony.*

In such case, it is competent for the state to prove that the defendant had committed the burglary the preceding night, as tending to show that the arrest could lawfully be made on pursuit without warrant, and that the defendant knew why he was sought to be arrested.

FROM the circuit court of Lauderdale county.

HON. S. H. TERRAL, Judge.

Appellant, a negro, was convicted of the murder of one Logan, also a negro, who was killed by him April 18, 1892, under the following circumstances: On the morning of that day it was discovered that a store in Meridian had been burg-

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Statement of the case.

larized the night before, and a number of articles stolen therefrom. Harvin, a constable, was notified, and, taking with him one Bloodsworth, and the deceased, Logan, he went in search of the person who had committed the crime. Logan had seen a man pass his house early in the morning, and they took the track of this man, and followed it something over half a mile to the woods. Here Logan, being in advance, discovered the defendant lying down, and he stopped and beckoned to the others to come on. The defendant was asleep, but was awakened by hearing the footsteps. Seeing the parties, and the motions made by Logan, he jumped up and fled. The pursuers called to him to stop, and Harvin hallooed to Logan to get a pistol and shoot him. Logan stopped and took Bloodsworth's pistol, and, running forward, fired it several times, calling to defendant to stop and surrender. But he did not stop, and the pursuers followed him, Logan being in front, and Bloodsworth some little distance behind him. The pursuit continued for a distance of more than half a mile. The parties soon passed out of Harvin's sight, but he followed on. Logan finally came up with the defendant. Both men were about exhausted, and were walking along side by side, Logan a little in front, with pistol in hand, saying to defendant, "Stop!" "Surrender!" Bloodsworth was in sight, and saw defendant drop his coat, which was under his arm, and turn and shoot Logan with a pistol. There was evidence tending to show that Logan also shot at this time. After shooting Logan, the defendant turned and shot Bloodsworth, who grappled with and overpowered him. Harvin then came up, and found Logan dying, and Bloodsworth holding the defendant on the ground.

The defendant afterwards confessed to his participation in the burglary. On the trial he testified that he ran because he was frightened by the approach of the men in the woods; that he did not know what they had come for; that he did the killing in self-defense; that deceased, having fired at him several times, was in the act of shooting again, when he shot

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Statement of the case.

him. Objection was made to proof by the state that the defendant had committed the burglary.

The parties making the arrest had no warrant. Prior to the killing the defendant was not informed of the object or cause of the attempted arrest. The only thing said to him was the demand to stop and surrender. He heard the command of the officer to shoot him.

The following instructions, among others, were given for the state:

"If the jury believe from the evidence that James Logan, acting with Harvin and Bloodsworth, was attempting to arrest the defendant for the burglary of Nerdlinger's store, and that the defendant, having reasonable grounds to believe them so acting, in order to escape or prevent the arrest, shot and killed Logan, then he is guilty of murder, and the jury should so find.

"If the jury believe from the evidence that the defendant was guilty of a felony, and that Logan, Harvin and Bloodsworth were in pursuit of him to arrest him, and defendant had reasonable ground to believe they were so acting, then Logan had a right to shoot at White, if it was necessary so to do in order to arrest him, and White had no right to return the fire or to shoot Logan.

"If the jury believe from the evidence that the defendant was guilty of a felony, then, under the law, James Logan, or any private citizen, had a right to arrest him with or without a warrant.

"The law does not require an officer to make known to the party whom he seeks to arrest the object and cause of such arrest, when the party whom they are seeking to arrest has reasonable ground to believe, from all the circumstances, that he is intended to be arrested, and the officers be on pursuit for that purpose."

For the defendant, the following instructions, with others, were given:

"The court charges the jury that the deceased, Logan, did

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Brief for appellant.

not have a right to shoot at the defendant unless it became necessary to take and overcome him; and, if the jury believe from the evidence that Logan fired the first shot at defendant, and was in the act of shooting him again, when no such necessity existed, then the defendant had a right to defend himself.

"If, from the evidence, the jury believe or entertain a reasonable doubt that, at the time the defendant shot James Logan, the defendant had reasonable grounds to believe that Logan was about unnecessarily to kill the defendant, or do him great bodily harm, and that, at said time, there was imminent danger that Logan would kill the defendant, then the defendant had a right to defend himself, and to shoot Logan to save his own life."

Defendant was convicted and sentenced to be hanged. Motion for new trial overruled.

The defendant being unable to employ counsel, the court below appointed attorneys to conduct his defense, and they represented him in that court and on this appeal.

S. A. Witherspoon and *R. F. Cochran*, for appellant,

Filed a lengthy written argument, making the following points:

1. It was necessary for Logan to "inform the accused of the object and cause of the arrest," in order to deprive him of the right of self-defense. Code 1880, § 3026. The defendant did not know whether the parties coming upon him in the woods were officers or highway robbers, and they gave him no intimation of what they wanted, except that they desired to shoot him. Commanding one to stop, and threatening to shoot him, is not an effort to arrest. If the party has no warrant, he must not only show the accused that he wants to arrest him, but must tell him the object and cause. The only exceptions are where the offense was committed in the presence of the person, and when the accused is arrested on pursuit. But in all cases the accused must be notified that

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Brief for the state.

the person desires to arrest him. This not being done, he may make his defense. It would have been as easy for Logan to inform defendant that he desired to arrest him as to inform him that he would shoot him. Defendant was not told that if he surrendered he would be considered under arrest, or taken to jail or before a court.

2. Defendant was not arrested on pursuit, and hence it was incumbent on Logan to inform him of the object and cause of the arrest. The expression, "on pursuit," in the statute applies to a case where the defendant is pursued from the place of his crime, when his very pursuit and flight shows that he knows the purpose of the arrest. So, too, if the crime is committed in the presence of the officer. The fact here that only a half-day elapsed after the burglary, and before the arrest, does not distinguish this case from one where ten years had intervened. Suppose ten years had elapsed, and defendant had been found sleeping in Washington county, would that be called an arrest on pursuit? In such case, the defendant could not be presumed to have any idea of the object of the pursuit.

3. The court, by the instructions, made the defendant's right to the statutory notice depend, not upon the question whether he was arrested on pursuit, but upon the question whether he had reasonable grounds to believe the burglary was the cause of his arrest. This was error. It made no difference what the defendant believed on that subject. If he was not arrested on pursuit, in the absence of a warrant, Logan had no right to arrest him without informing him of the cause.

We submit that the judgment must be reversed.

T. M. Miller, attorney-general, for the state.

The appellant was properly convicted. The circumstances abundantly negative the theory that the defendant may have supposed that he was pursued by a band of robbers, and that he did not know the purpose for which the effort was being

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made to arrest him. When the accused is taken in pursuit, as here, it is not necessary to inform him of the object and cause of the arrest. *People* v. *Pool*, 27 Cal., 572.

What is true of an officer arresting for felony, applies to a private person. *State* v. *Spaulding*, 34 Minn., 361; Roscoe's Cr. Ev., 760.

Where one who has freshly committed a felony is pursued, and he has good reason to believe the purpose is merely to arrest and bring him to justice, there is no room for him to suppose that he is in danger of life or bodily harm if he surrenders.

There can be no question of the correctness of the instructions here, or of defendant's guilt. He cannot invoke the doctrine of self-defense, under the facts of the case.

COOPER, J., delivered the opinion of the court.

It was competent for the state to prove that the appellant had been guilty of burglary on the night preceding the homicide, because:

1. That fact tended to show that the deceased had the right to arrest the appellant without a warrant.

2. It tended to show that appellant knew why he was sought to be arrested.

The pursuit of appellant was a fresh pursuit, within the meaning of § 3026, code 1880. What is fresh pursuit must be determinable by circumstances, and where, as in this case, a felony is committed at night, discovered in the morning and the officer immediately follows and overtakes the felon, who is attempting to escape, it is not necessary that he shall have a warrant for his arrest; and where, as here, the fleeing felon is commanded to surrender, but refuses so to do, and runs away, and, being overtaken, kills the person seeking to arrest him, he cannot invoke the principle of self-defense.

This case, in all its facts, is strikingly similar to *People* v. *Pool*, 27 Cal., 572, in which the questions here decided were involved.

Judgment affirmed.

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Statement of the case.

W. J. QUARLES ET AL. v. C. H. HIERN.

APPEAL. *Supreme court. Loss of papers by appellee. New trial.*

Where an appeal is perfected, on showing by affidavit that a transcript of the record cannot be had because of the loss or destruction of the original papers by appellee's fault, the court will grant a rule on him to show cause why there shall not be a reversal; and, if it appears that the papers have been lost or destroyed, so that the merits cannot be known, the court will reverse, that there may be a new trial.

MOTION in the supreme court.

In a suit brought by Hiern, the appellee, against Quarles and others in the chancery court of Harrison county, a final decree was rendered in favor of Hiern. After entry of the decree, the original papers were turned over to Hiern, the successful complainant, at his request, for examination. Defendants perfected their appeal, but as Hiern has never returned the file of papers to the clerk of the chancery court, it has been impossible to make a complete transcript for the appeal.

Appellants have caused a transcript of the decree to be filed in this court with the bond for appeal, and a certificate by the chancery clerk as to the loss of the papers, and his consequent inability to make the transcript. Affidavits were also filed by the attorneys for complainant and defendants, from which it appears that the papers have either been lost or destroyed while in the possession of Hiern.

This motion is made by appellants for a rule on said appellee to show cause why the decree shall not be reversed if the papers be not restored.

Nugent & Mc Willie, for motion.

Argued orally by *W. L. Nugent*, for the motion.

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Syllabus.

CAMPBELL, C. J., delivered the opinion of the court.

This is a case for the practical application of the maxim, *omnia praesumuntur contra spoliatorem*, and therefore it is ordered that a rule be made on the complainant in the bill, appellee here, to show cause, on the third Monday of January next, why the decree appealed from shall not be reversed, which will be done unless the original papers shall be produced to the clerk of the chancery court of Harrison county, so that a transcript may be made for this appeal. In no other way can justice be surely done to the appellant. If the papers have been destroyed or lost by him who obtained the decree, so that it cannot be shown to this court by a transcript of the case which resulted in the decree complained of, that it was not proper, it is no wrong to the party chargeable with responsibility for the absence of the papers to restore the *status quo ante* the decree by reversal, and he may then proceed, if he can, to get another decree.

Motion sustained.

P. MONEY *v.* C. R. PEAVY ET AL.

1. DEED. *Partition wall. Contract to build.*

To recite in a deed, as a part of the consideration, that the vendees, or any subsequent owner of the land conveyed, "shall have the right of uniting with and using the south wall which may be erected by us" thereon, is not to stipulate that a wall shall or *will* be built, and the grantors are not liable in damages for failure to erect one.

2. EVIDENCE. *Writing. Contemporaneous parol agreement.*

Because of the writing, a contemporaneous parol agreement by such grantor to build the wall cannot be shown.

3. PARTITION WALL. *Verbal agreement to build. Code* 1880, § 979.

Section 979, code 1880, authorizing verbal contracts between those "who own adjoining lots" for erecting partition walls, does not apply to contracts whereby parties are negotiating to become such owners.

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Brief for appellant.

FROM the circuit court of the first district of Carroll county.

HON. C. H. CAMPBELL, Judge.

This is an action by P. Money to recover of C. R. Peavy and others damages for breach of an alleged contract to build a partition wall. The declaration alleges that plaintiff conveyed to defendants a certain lot in the town of Carrollton, and, in exchange therefor, defendant, C. R. Peavy, executed to him a deed reciting a cash consideration of $600, and containing this further clause: "And we also agree, as a part of this deed, that the said Pierson Money, and the subsequent owners of the lot herein conveyed, shall have the right and privilege of uniting with and using the south wall which may be erected by us on the south boundary of our part of lot No. 9, situated in the town of Carrollton;" that it was the agreement between plaintiff and defendants, at the time the deed was executed, that the latter should erect said wall, and, but for such agreement, plaintiff would not have executed his deed; that the privilege of uniting to said wall was a part of the agreed consideration, and was and is of the value of $400; that defendants have refused to erect it, to plaintiff's damage, etc.

Defendants demurred to the declaration, mainly upon the ground that the deed did not import a contract to erect the wall. Demurrer sustained, and plaintiff, declining to amend, prosecutes this appeal.

Section 979, code 1880, is as follows: "Any agreement for erecting walls which parties may make who own adjoining lots, and desire to build partition walls, shall be binding, whether in writing or not; and, in case of failure of either party to comply with his contract, the other may have his appropriate action for damages."

A. H. Somerville and *W. R. Harper*, for appellant.

The declaration is not intended as an action of covenant on the deed, but to recover the consideration which, it is al-

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leged, rested in parol. The clause in a deed reciting payment of the consideration only estops the grantor from denying that there was a consideration. For every other purpose it is open to explanation, and the real consideration may be shown by parol. Devlin on Deeds, § 823. The deed may be evidence tending to show what the consideration was, but it does not purport to state all the consideration.

Southworth & Stevens, for appellees.

The written instrument shows no obligation on appellees to build the wall, but only a right in appellant to unite with and use the wall when it may be built. Any contemporaneous parol agreement was merged in the writing.

CAMPBELL, C. J., delivered the opinion of the court.

If this was a bill in chancery to rescind the contract between the parties, or to rectify the conveyance, the provision in it relied on as the basis of this action might be strongly corroborative of parol testimony as to the contract made, but the demurrer to the declaration was properly sustained, for its allegations are not sufficient to show any violation of contract by the defendants, who, by their conveyance, simply granted the right of "using the south wall which *may* be erected by us"—not which shall or will be. They did not obligate themselves to do it. Considered with reference to the conveyance, no right of action is shown, and any contemporaneous parol agreement about it was merged in the writing.

Section 979 of the code of 1880 does not apply, for it is limited to those "who own adjoining lots," and does not change the law applicable to contracts, whereby parties are negotiating to become such owners.

Affirmed.

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Brief for appellants.

W. C. POUNDS ET AL. v. CLARKE, HOOD & CO.

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HOMESTEAD. *Conveyance. Failure of wife to sign. Doing equity.*

Although the wife must join in a conveyance of her husband's homestead, she has no estate therein, and is not a proper party to a bill by him to cancel a trust-deed thereon given by him alone; and he cannot, by joining her as a complainant, avoid the requirement in a court of chancery of doing equity by offering to pay the secured debt. *Massey* v. *Womble*, 69 Miss., 347, distinguished.

FROM the chancery court of Lee county.

HON. BAXTER MCFARLAND, Chancellor.

Appellants, W. C. Pounds and M. L. Pounds, his wife, filed this bill against appellees to cancel a deed of trust, by which W. C. Pounds conveyed the land in controversy to one Gray to secure a debt due to appellees, and also to cancel the conveyance by said trustee to them. The bill seeks to avoid the deeds, on the ground that the land was the homestead of the complainants, and the wife did not join in the execution of the trust-deed. The defendants, after their purchase, had obtained possession by an action of unlawful detainer, and were in possession when the bill was filed. They demurred, on the ground that complainants do not offer to do equity. Demurrer sustained, bill dimissed and complainants appeal.

E. H. Bristow, for appellants.

In *Duncan* v. *Moore*, 67 Miss., 136, the debtor husband alone filed the bill. The wife had, presumably, waived her veto right by refusing to join in the bill. Here the innocent and injured wife joins in the bill. In *Massey* v. *Womble*, 69 Miss., 347, the widow and children, as heirs at law, were allowed to join in a bill to vacate such a void conveyance. The wife has no estate, it is true, but her veto power will avail little if the husband can incumber, and the incum-

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Opinion of the court.

brance is good until the debt is paid. In equity the complainant needs no legal title. An equity, a usufruct, a power or expectation, is sufficient.

J. A. Blair, for appellees.

This case is controlled by *Deans* v. *Robertson*, 64 Miss., 195.

WOODS, J., delivered the opinion of the court.

M. L. Pounds, the wife, was neither a necessary nor a proper party to the litigation. She had no interest in the lands, and if, as appears, the husband had undertaken to convey the homestead without the wife's joining therein, the conveyance may be shown by the grantor to be invalid in any forum in which the question may arise. The attack may be made upon this invalid conveyance by the husband, at law or in equity, and there is neither necessity nor propriety in making the wife a party to litigation concerning lands in which she has no estate or interest.

If the husband elects to invoke the aid of a court of equity rather than resort to a law court, the shadow of the wife's name, as an unnecessary party to the proceeding, will not absolve him from the operation of the rule which requires him to do equity before asking relief in equity. Though the conveyance is invalid, the appellant must be required to do equity, by paying what the conveyance was designed to secure, before he can have a court of conscience cancel the invalid instrument.

The case is readily distinguishable from that of *Massey* v. *Womble*, 69 Miss., 347. In that case, the husband, who had conveyed without the wife's joinder, was dead, and the wife had succeeded to the headship of the family, and had an estate in common with her children in the premises. She was a necessary and proper party, and she was under no obligation to pay any debt secured by the invalid conveyance.

Affirmed.

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Opinion of the court.

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LOUISVILLE, NEW ORLEANS & TEXAS RY. CO. v. E. M. SUDDOTH.

1. RAILROADS. *Killing stock. Negligence. Instruction.*

In an action against a railroad company for killing a horse on its track, where there is evidence tending to show negligence on the part of the engineer, an instruction is erroneous which declares disjunctively that defendant is not liable if the employes used reasonable care to avoid the injury, or, after seeing the animal, it was impossible to stop the train in time to avoid the injury. The impossibility of stopping after *seeing* the danger could not relieve from previous negligence, if such there was.

2. ERRONEOUS INSTRUCTION. *Modification of; who may complain.*

One who has asked an erroneous instruction cannot assign for error its modification, for, if not content with it as modified, he should have declined to read it to the jury.

FROM the circuit court of Coahoma county.
HON. R. W. WILLIAMSON, Judge.
The case is stated in the opinion.

Mayes & Harris, for appellant.

Fitzgerald & Maynard, for appellee.

Argued orally by *J. B. Harris*, for appellant.

COOPER, J., delivered the opinion of the court.

The appellee sued the appellant to recover the value of a horse killed by one of its trains.

The plaintiff's evidence tended to show negligence on the part of the engineer of the train, especially in not checking its speed when the danger of injuring the animal became apparent. The defendant asked the court to instruct that, "if they believe, from a preponderance of the evidence, that

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the defendant's employes used reasonable care and caution to avoid the injury, or that, after seeing the horse on the track, it was impossible to have stopped the train in time to avoid the injury, they will find for the defendant."

The court modified the instruction, so that it read as follows: "If they believe, from a preponderance of the evidence, that the defendant's employes used reasonable care and caution to avoid the injury, *and* that, after seeing the horse on the track, it was impossible to have stopped or slowed up the train in time to avoid the injury, they will find for the defendant."

It may be admitted that the instruction, as modified, imposed upon the defendant too great a degree of care to avoid injury to the animal, after its danger was discovered, and was, therefore, erroneous. But this will avail nothing, unless the instruction, as asked, was correct. If the defendant was not content with the instruction, as modified, it should have declined to read it to the jury.

No modification of an erroneous instruction can be assigned for error by the party asking the instruction, for the court might refuse such instruction outright. One who is entitled to nothing cannot complain that he gets something, but less than he asks. The instruction, as asked, was erroneous, because of its statement, in the disjunctive, that doing what could have been done to avoid the injury, after the danger was discovered, discharged the defendant from any precedent negligence.

The judgment is affirmed.

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Brief for appellants.

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CHARLES DOLLMAN ET AL. *v.* J. C. MOORE.

1. CONSTRUCTION OF STATUTES. *"Person." Municipality not embraced, when.*

Generally, where a statute deals primarily with matters foreign to the ordinary functions of public corporations, and imposes burdens or liabilities on persons without any corresponding benefits, the word "person" will not be held to embrace municipal corporations exercising a part of the state's sovereignty.

2. SAME. *Attachment in chancery. Garnishment. Code* 1880, § 1832. *Case.*

A municipal corporation, or its board of school-trustees, is not a "person" within the meaning of § 1832, code 1880, conferring upon chancery courts jurisdiction of attachment suits against non-resident, absent or absconding debtors and persons in this state, who have in their hands effects of, or are indebted to, such debtors.

3. ATTACHMENT IN CHANCERY. *Non-resident. Jurisdiction. Remedy at law.*

Independently of statute, by virtue of its general equity powers, a chancery court may, without a judgment at law and *nulla bona* return, subject to the demands of creditors the effects in this state of a non-resident debtor. *Zecharie* v. *Bowers*, 1 Smed. & M., 584, overruled.

4. MUNICIPALITY. *Garnishment of. Decree; who may object.*

Where a municipality, against which, as garnishee, a decree has been rendered in an attachment suit in chancery against a non-resident, fails to object that it is not subject to garnishment, the objection, not being jurisdictional, cannot be made by the defendant in attachment on appeal.

FROM the chancery court of Yazoo county.
HON. H. C. CONN, Chancellor.
The case is stated in the opinion.

Williams & Williams, for appellants,

Filed a lengthy brief and argument, discussing all the assignments of error, and as to the matters passed on by the court, making the following points, and citing the following authorities:

The board of school-trustees is a public corporation, ex-

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ercising a part of the sovereignty of the state, and having public duties and functions, and, as such, it is not embraced in the word "person" in the statute. It is not subject to garnishment. In support of this view, see 8 Md., 95; 6 Vt., 121; 26 Ala., 498; 36 *Ib.*, 624; 45 Ill., 1; 9 Heis., 511; 45 Ill., 134; 4 Minn., 184; 54 Miss., 363; 10 Am. St. Rep., 196; 23 Am. Rep., 667; 21 *Ib.*, 277; 12 Conn., 404; 29 Penn., 173; 15 Wis., 193; 40 Miss., 67; 8 Mass., 247; 7 *Ib.*, 246; 11 Conn., 123; 3 Bax. (Tenn.), 368; Freeman on Executions, § 133. The rule is impliedly recognized in *Board Supervisors* v. *Gillen*, 59 Miss., 198. See also 25 Ill., 596; 7 Mon., 439; 12 Gill & J., 399; 26 Wis., 449; 49 *Ib.*, 449; 14 *Ib.*, 291; 37 Ga., 240; 8 Am. & Eng. Enc. L., 1135.

The objection that the municipality is not subject to garnishment, is jurisdictional, and it cannot be waived. The garnishee cannot, without his debtor's consent, subject his property to garnishment by waiver. 33 Am. Rep., 422. The exemption from garnishment is granted from public necessity, and no one can waive it. 8 Am. & Eng. Enc. L., 1135, notes 4 and 5, and cases cited. It would be unjust to put it in the power of a garnishee to prefer certain of the creditors by its waiver. Besides, there is no express waiver in this case, and the courts will not presume one.

Calhoon & Green, on the same side.

School-boards are not garnishable. 8 Am. & Eng. Enc. L., 1135; Drake on Attach., § 516; Wade on Attach., § 419; *Board* v. *Gillen*, 59 Miss., 198. The question is simple and sharp, and the authorities compiled and easily accessible. We refer especially to 54 Ind., 501; 54 Ga., 399; 52 Vt., 204.

The weight of authority is that the exemption from garnishment cannot be waived. 8 Am. & Eng. Enc. L., 1135; Drake on Attach., § 516.

Henry & Richardson and *Campbell & Hudson*, for appellee.

Section 1832, code 1880, confers the remedy by attachment in chancery against non-resident debtors and persons in-

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Brief for appellee.

debted to them in this state. Section 1898 of the code, defining the remedy, provides for the attachment "of the indebtedness of the defendant in this state to such non-resident." The terms could hardly be broader. They embrace artificial, as well as natural persons. The rules for construing the code require this. Code 1880, § 13.

Our supreme court has uniformly construed statutes of this kind favorably to the creditors, even holding, against the weight of authority, that an officer holding money under execution, may be garnished. *Burleson* v. *Milan*, 56 Miss., 399.

As a deduction from all the authorities, we contend as follows:

1. A public corporation may be garnished, especially when the debtor is a third person, not the officer or agent of the corporation.

2. The true test whether a corporation may be garnished is whether it may be sued.

3. If a garnishment will not lie at law, it will lie by way of creditors' bill on attachment in equity.

4. If there is an exemption from garnishment, it is a personal one, and must be pleaded by the corporation itself, not by the debtor.

In support of the several propositions contended for, see 38 N. J. L., 88; Dillon, Mun. Corp., § 65; 4 Clark (Iowa), 302; Drake on Attach., § 516; 20 Conn., 416; Wade on Attach., § 345; Waples on Attach., § 234; 10 R. I., 285; 5 N. H., 13; 15 Ohio St., 462; 121 Mass., 380; 49 Mo., 568; 21 *Ib.*, 239; 11 *Ib.*, 59; 10 Mon., 515, s.c. 24 Am. St. Rep., 67.

If a non-resident debtor cannot be garnished in cases like this, merely because his debtor is a public corporation, the resident creditor will be practically without remedy. It is significant that the case, 54 Ind., 501, relied on by appellant, distinguishes the Missouri case, last cited above, by the fact that it was a bill in equity to subject a debt from the corporation.

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Opinion of the court.

Argued orally by *S. S. Calhoon*, for appellant.

COOPER, J., delivered the opinion of the court.

The appellee exhibited his bill in the chancery court of Yazoo county against Charles Dollman, a non-resident of this state, and against the board of school-trustees of Yazoo City.

The bill alleges that Dollman is indebted to complainant for work and labor done by him in and about the erection of a school-building, which Dollman contracted to build, and did build, under a contract with said board of trustees, and that said board of trustees is indebted to Dollman in a sum in excess of the debt due complainant. The prayer is that the board of trustees may be directed to pay to complainant, out of the funds in its hands due to Dollman, the amount he owes complainant.

The board of trustees answered, admitting an indebtedness to Dollman, but stating that the building had not been finished, and that it could not be known what amount, if any, would remain in its hands. Subsequently the board filed another answer, stating that the building had been finished, and the board had in its hands the sum of $1,500 as balance due on the building, but that since its former answer had been filed the board had received notice that Dollman had transferred his right to the fund to the Cole Manufacturing Company, which company it asked might be made a party to the proceedings.

The Cole Manufacturing Company was admitted to defend, but, since it is not disputed that its claim to the fund was by virtue of an assignment made by Dollman after process served in the original proceeding, its answer need not be considered.

Dollman demurred to the bill, and, that being overruled, he answered, and the cause proceeded to final hearing, when a decree was made in favor of complainant, from which decree Dollman and the Cole Manufacturing Company appeal.

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The defense made by Dollman to the proceeding rests upon three grounds:

1. That the proceeding is a statutory attachment in chancery, and that the demand sought to be subjected is not within the terms of the statute.

2. That it is against public policy to permit governmental agencies to be garnished, or drawn into controversies with private persons touching matters with which they have no concern, and that this immunity is not a mere privilege which may be waived by the body-politic, but is jurisdictional in character, and may be insisted on by any party to the suit, and at any stage of the proceedings.

3. A denial of the debt sought to be collected.

It is evident that the proceeding was instituted and prosecuted as one under our statute regulating attachments in chancery, and, if it be true that it can be supported only by the statute, it must fail if the statute has no application because of the character of the debt sought to be subjected to the complainant's demand. The provision of the code providing for attachments in chancery against non-residents is as follows:

"The said chancery courts shall have jurisdiction of attachment suits against any non-resident, absent or absconding debtor, who has lands or tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such non-resident, absent or absconding debtor." Code of 1880, § 1832.

It is not pretended that the defendant has lands or tenements in this state. The statutory jurisdiction must, therefore, rest upon that clause of the statute giving attachment against a non-resident, absent or absconding "debtor, and *persons* in this state who have in their hands effects of, or are indebted to, such non-resident, absent or absconding debtor."

Is a municipal corporation a "person" within the meaning of the statute?

Primarily, the word "person" means a natural person, but

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when used in statutes, its signification is so controlled by the context that it may be said to rest upon it. Ordinarily, it may be supposed that in general statutes the word is intended to include both natural and artificial persons. Lord Blackburn in *Pharmaceutical Society* v. *London, etc., Association*, 5 App. Cases, 857.

The word may or may not include the state or its subdivisions. 18 Am. & Eng. Enc. L., title Person, p. 403, note 2, where many authorities are collected.

Whether a state, or a municipality or other corporation exercising a subdivision of its sovereignty, is included by the terms of a statute—not being expressly named—must be determined by a consideration of the subject-matter of the statute, its purpose and effect. When the statute primarily refers to matters foreign to the ordinary functions of public corporations, and imposes burdens, duties or liabilities upon them, without any corresponding benefits, the inference must be that it was not the legislative purpose that such corporations should be subject to its provisions. The inconvenience which would arise from subjecting these bodies, created for the performance of public functions, to be proceeded against as garnishees at law and in equity, and when a mere neglect to respond to the summons would subject the public represented by such corporation to the burden of a judgment for the demand of the attaching creditor, is strongly persuasive against such construction of the statute as would include these bodies. We are, therefore, of opinion that the garnishee in this case was not a "person" having in his hands effects of, or indebted to, the non-resident defendant, and that the proceeding, in so far as it was based upon the statute, must fail.

It remains to be inquired whether, without regard to the statute, but under the general principles of equity, the decree should be upheld.

By the act of June 7, 1822 (Hutch. Code, 764), the statutory remedy of attachment in chancery against non-

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Opinion of the court.

resident defendants was provided. More than twenty years afterwards a bill was exhibited by a non-resident against a non-resident owning lands in this state, to subject the land to the payment of a debt for which complainant had recovered judgment in another state. The bill was framed without reference to the statute, and was sought to be supported upon the general principles of equity. Judge Clayton, in delivering the opinion of the court, said: "There was an order of publication in the chancery court, and a decree *pro confesso* entered, which, however, was afterwards set aside, and the bill dismissed. The ground of dismission was the want of jurisdiction, the chancellor being of opinion that his court had no jurisdiction over the person of the defendant, and none over the land sought to be subjected, unless there had been a previous judgment at law in this state. Apart from any legislative enactment, this view was certainly correct. By the recognized principles and rules of proceedings in the English chancery court, this case would be beyond the sphere of its jurisdiction." The court then proceeded to show that by virtue of the statute the bill might have been so amended as to be maintainable, but the decree, being correct on the bill as framed, it was affirmed. *Zecharie* v. *Bowers*, 1 S. & M., 584, s.c. 3 *Ib.*, 641. Since the decision in this case, all attachments in chancery against non-residents have been, so far as we are advised, under the statute, and there has been no case in which it has been sought to uphold the jurisdiction of the court in this class of cases without reference to its provisions. There are, however, innumerable *dicta* in cases since *Zecharie* v. *Bowers*, in which the rule therein announced has been declared. The subject has not been examined since the decision in that case, for the reason that no necessity has existed for appealing to the general jurisdiction of equity, since almost every imaginable case where relief can be afforded at all is within our statute. But we are not satisfied with the rule announced in *Zecharie* v. *Bowers*. We think the decision there should have

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been for the complainants. The general rule undoubtedly is that a court of equity will not lend its aid to enforce a legal demand until there has been a judgment at law, and, in some cases, an execution thereunder, with a return of *nulla bona*. But the rule never was of universal application, and was limited by the reason upon which it rested. When the debtor died or was beyond seas, the complainant could have relief in equity. The principles upon which the rule rested were that legal questions should be tried by courts of law, and that suitors should exhaust their legal remedies before resorting to courts of equity. But how can a creditor obtain a judgment at law upon which the jurisdiction of equity would rest against a non-resident debtor? He might, it is true, go to the jurisdiction of the debtor, and there sue and recover judgment, and have execution and *nulla bona* thereon; but such proceedings would advance him no step, for when a judgment at law is essential, it must be a domestic one. *Farbell* v. *Griggs*, 3 Paige Ch., 208. In the absence, then, of a statutory remedy by attachment at law or in equity, it would be impossible to subject the estate of a non-resident to the payment of his debts.

It would be a surprising condition of affairs if a non-resident debtor owning property in this state to creditors resident here could never have been compelled to pay his debts by the courts of this state exercising their common law jurisdiction. The authorities are numerous that, under such circumstances, resort may be had to equity in the first instance.

In *Farrar* v. *Haselden*, 9 Rich. Eq. (So. Ca.), 331, the court said:

"When a debtor is absent from this state, having property within the state which cannot be reached by the ordinary process of law, it has been a practice much older than *Kinloch* v. *Meyer* (Speer's Eq., s. c. 427) to grant relief in this court, as against such property, to the creditors of such absent debtor. In such case, he may have taken no steps to recover,

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or establish his demand at law, because the law afforded no process by which he could make his debtor a party in court."

In *Merchants' Nat. Bank* v. *Paine*, 13 R. I., 593, Durfee, Ch. J., delivering the opinion of the court, said: "If it were true that the only reason for the rule is the exhaustion of legal remedies, we should not hesitate at all to assert the jurisdiction, for, very clearly, where no legal remedy exists, none can be exhausted, and the reason for the rule would cease, and, with the reason, the rule itself. *Cessante ratione legis, cessat ipsa lex.* There is, however, another reason for the rule, namely, that a court of law is the proper tribunal, not only to afford a remedy for legal claims, but also to adjudicate them. It seems to be well settled, however, that a creditor may proceed in equity without getting a judgment at law, if his debtor be dead. And, if he can so proceed, if his debtor be dead, then there can be no insuperable reason against his so proceeding while his debtor is alive. *Thompson* v. *Brown*, 4 Johns. Ch., 619; *O'Brien* v. *Coulter*, 2 Blackf., 421; *Steeve* v. *Hoagland*, 39 Ill., 264; *Whitney* v. *Kimball*, 4 Ind., 546; *Thorp* v. *Felty*, 6 B. Mon., 6; *Evingham* v. *Vanderbilt*, 19 N. Y. Sup. Ct., 75; *Offutt* v. *King*, 1 McArthur, 312."

The jurisdiction of courts of equity to afford relief to one not having reduced his demand to judgment against a non-resident defendant having property in the state, has been affirmed in many other cases. *Scott* v. *McMillen*, 1 Litt., 302; *Peay* v. *Morrison's Ex'r*, 10 Gratt. (Va.), 149; *Bank* v. *Whetman*, 124 N. Y., 241; *Pope* v. *Solomons*, 36 Ga., 541; *Smart* v. *Abbett*, 102 Ind., 233; *Pendleton* v. *Perkins*, 49 Mo., 565.

If the decision in *Zecharie* v. *Bowers*, 1 S. & M., 584, announced a rule of property, we should, notwithstanding our dissent from it, adhere to the decision, on the principle of *stare decisis;* but such is not the case, and, its only effect being to deny a remedy, we feel no hesitation in declaring a contrary rule, and overruling that decision.

We are not to be understood to say that a court of chan-

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cery will, in the exercise of its jurisdiction, permit municipal corporations to be subjected to decrees in favor of creditors of those to whom it may be indebted in all cases and under all circumstances. Certainly this should not be done when the effect would be to hamper or restrict them in the performance of public functions, or impede the execution of any contract into which they have entered. The exercise of a proper judicial discretion may be safely left to the courts, to be exercised as occasion requires. It is sufficient to say, in this case, that the trustees of Yazoo City made no objection to submitting to complainant's decree, and the objection, not being jurisdictional, cannot be made by the appellants.

We have examined the evidence, and are not prepared to disturb the conclusion of the chancellor on the facts, which was reached upon weighing conflicting testimony.

Affirmed.

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W. C. PEARCE *v.* FLORA PERKINS ET AL.

1. TAX-TITLE. *Assessment. Failure to return roll. Act of* 1887. *Case.*

A special act for Monroe county (Laws 1877, p. 109) required the land assessment-roll to be returned on the first Monday in July, 1877. At the August term the minutes of the board of supervisors recited that, on account of sickness, the assessor was not present with the roll, and directed notice to be given that the matter of examining it be postponed until the first Monday in September. On the eighth day of the September term the minutes recited that the roll was presented. *Held*, that the roll was not returned at the time required by law, and a sale for taxes based thereon is void.

2. TAX-DEED. *Description. Uncertainty. Reference to roll.*

A patent ambiguity in the description of land in a tax-deed made in 1875 cannot be aided by reference to the assessment-roll, if the deed itself contains no such reference. The mention of the reputed owner's name in the deed is not such a reference in aid of the description. *Bowers* v. *Andrews*, 52 Miss., 596.

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Brief for appellant.

3. SAME. *Insufficient description. Case.*

Accordingly, a tax-collector's deed which describes land thus: "owner's name, C. Dowd, bal. sec. 8, T. 12, R. 17," and the deed from the state as, "bal. sec. 8, T. 12, R. 17," are void for uncertainty of description, and cannot be aided by reference to the assessment-roll.

4. TAX-TITLE. *Three years' possession. Wild land. Code* 1880, § 539.

In order to entitle a purchaser at tax-sale to the benefit of the statute of limitation prescribed by § 539, Code 1880, "the actual occupation for three years, after one year from the day of sale," must be of at least a part of the land, and must be continuous for three years.

5. SAME. *Void description. Lapse of time. Code* 1871, § 1709.

Section 1709, code 1871, which prohibits suits to invalidate tax-titles after three years from the time of sale, does not apply where the tax-deed is void for uncertainty of description.

FROM the chancery court of Monroe county.

HON. BAXTER MCFARLAND, Chancellor.

Pearce, the appellant, filed this bill June 1, 1891, seeking confirmation of certain tax-titles. The bill sets out a number of purchases from the state of distinct tracts of lands, and, as to a part of the lands so purchased, he obtained a decree confirming his title. But, as to certain other tracts, the bill was dismissed, and complainant appeals. It is unnecessary further to add to the facts stated in the opinion.

E. H. Bristow, for appellant.

1. Appellant's title to the land in section 8 is good, because, (1) the assessment, levy and sale to the state, and the state's deed to appellant, of themselves, are valid; and (2), if not, the error is cured by proof *aliunde* of what land was sold. I admit that, if the deed itself must show definitely the land sold, the description is insufficient; but, every tax-deed made by the state includes and refers to not only the assessments and lists of land sold to the state, but the government surveys and maps. The same liberal principles must be applied as are applicable to execution sales, in which the essential things are the judgment, execution, levy and sheriff's deed.

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Brief for appellant.

Virden v. *Bowers*, 55 Miss., 1. The most important element is the assessment. No failure to observe the statutory requirements vitiates a description on the assessment-roll. Code 1871, § 1676. In this case, the roll shows what the word "balance" means. We know from government surveys how many lots are in section 8, and, as certain of the lots are assessed by numbers, the "balance" must mean all the other lots in the section. In the same way we can identify the land on the lists and as sold by the state. The word "balance" is relative, and can be identified. If it were "part of section 8," it would be different, as "part" is an absolute term, incapable of a fixed meaning. See *Brown* v. *Guice*, 46 Miss., 299. In *Bowers* v. *Andrews*, 52 Miss., 596, the roll, when referred to, contained the same insufficient description, and could not aid in identifying the land sold, as it can and does in this case; and so in *Dingey* v. *Paxton*, 60 Miss., 1038. In *Cogburn* v. *Hunt*, 54 Miss., 675, the court held that the assessment and sales lists did not aid the description, thus implying that they could be looked to. In *Selden* v. *Coffee*, 55 Miss., 41, relied on by appellee, there was no attempt to cure the insufficient description by averment or reference.

2. But, if the description be insufficient, the three years' statute (Code 1871, § 1709) bars any attack. The curative force of the statute applies to all defects, and bars any kind of attack. *Jones* v. *Brandon*, 59 Miss., 585; *Berry* v. *Gibson*, 66 *Ib.*, 515; *Sigman* v. *Lundy*, *Ib.*, 522; *Pipes* v. *Farrar*, 64 *Ib.*, 514; *Jonas* v. *Flanniken*, 69 *Ib.*, 577; *Nevins* v. *Baily*, 62 *Ib.*, 433; 1 Blackw. on Tax Titles, § 520; 2 *Ib.*, §§ 925, 928; 1 W. & S., 175.

3. The assessment of 1877 was valid. There is nothing in the record to show affirmatively that the roll was not presented at the July term. But I submit that such a thing as the accidental sickness of an assessor, and his consequent absence, would not hopelessly vitiate an assessment beyond the power of the board to postpone the presentment and ap-

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proval. It has been decided that the approval may be postponed. *Wolfe* v. *Murphy*, 60 Miss., 1.

4. Granting the roll to be defective, the defects have been cured by the three years' possession. Code 1880, § 539; *Nevins* v. *Baily*, 62 Miss., 433. "Actual occupation" of wild land means nothing more than such exclusive holding as the land is susceptible of, and which is not interfered with by any other claimant. It may be actual, though not corporal. *Davis* v. *Bowmar*, 55 Miss., 671; *Ford* v. *Wilson*, 35 *Ib.*, 490. See also 2 Blackw. on Tax Titles, § 914. Possession and occupation are convertible terms. *McGee* v. *Holmes*, 63 Miss., 50; *Pipes* v. *Farrar*, 64 *Ib.*, 514; *Lewis* v. *Siebels*, 65 *Ib.*, 252; 21 Ill., 178; 121 *Ib.*, 455; 30 Iowa, 242; 19 Cal., 688.

Sykes & Richardson and *Clifton & Eckford*, for appellees.

1. The roll of 1877 was not presented at the July term, and is therefore void. *Stovall* v. *Connor*, 58 Miss., 138; *Harris* v. *Stockett*, *Ib.*, 825; *Fanning* v. *Frenches*, 60 *Ib.*, 541; *Wolfe* v. *Murphy*, *Ib.*, 1. Appellee denies that any actual possession has been shown in appellant.

2. The tax-deed to the land in section 8 is clearly void, for uncertainty of description. *Bowers* v. *Andrews*, 52 Miss., 596; *Brown* v. *Guice*, 46 *Ib.*, 299; *Dingey* v. *Paxton*, 60 *Ib.*, 1038; *Cogburn* v. *Hunt*, 54 *Ib.*, 675; *Selden* v. *Coffee*, 55 *Ib.*, 41. Section 1676, code 1871, does not aid the description, as it is patent. *Cogburn* v. *Hunt*, *supra*.

3. The proof failed to show that appellant had been in actual or adverse possession. The three years' statute (Code 1880, § 539) can therefore have no application. As to what constitutes possession, see *Dickson* v. *Cook*, 47 Miss., 220; *Huntington* v. *Allen*, 44 *Ib.*, 654; *Ellis* v. *Murray*, 28 *Ib.*, 129; *Alexander* v. *Peck*, 39 *Ib.*, 737.

COOPER, J., delivered the opinion of the court.

The minutes of the board of supervisors show that a new assessment of the lands in the county for the year 1877 was

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ordered to be made under the provisions of the act of January 31, 1877 (Laws, p. 109); and they also affirmatively show that the roll made by the assessor was not returned to the board on the first Monday of July, 1877, as by that act was required.

At the August term the board, by an order on its minutes, recited that on account of sickness the assessor was not present with his roll, and directed notice to be given that "the matter of examining and correcting said rolls be postponed, and set for the meeting to be held on the first Monday of September next."

The September term began on Monday, the third day, and on the eighth day of that term an entry was made on the minutes that the roll was presented to the board by the assessor. Under no reasonable construction of these entries can it be assumed that the roll had been returned at the time required by law. The decisions of this court are numerous and uniform that such a defect of the proceedings to assess vitiates the roll, and that sales for taxes under an assessment of this character are void.

The evidence for the complainant fails to show such possession of the land, in sections 17 and 18, which were sold under the assessment of 1877, as to protect the tax-title under § 539 of the code. That section declares that "actual occupation for three years, after one year from the day of sale, of any land held under a conveyance by a tax-collector, in pursuance of a sale for taxes, shall bar any suit to recover such land, or assail such title because of any defect in the sale of such land for taxes, or in any precedent step to such sale."

The possession necessary to put in operation this statute must be an actual occupation of at least a part of the land, and continuous for the time named. The chancellor rightly held that complainants were not entitled to any relief as to the lands in sections 17 and 18.

The other lands as to which relief was denied to complain-

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ants consists of a part of section 8, township 12, range 17. This land was sold to the state on the 1st day of March, 1875, for the taxes of 1874, and was afterwards conveyed by the auditor to the complainant. In the conveyance from the tax-collector to the state the land is described as "owner's name, C. Dowd, balance section 8, township 12, range 17;" and from the state to the complainant as "balance of section 8, township 12, range 17, west." The chancellor held these conveyances to be void, for uncertainty in the description of the subject-matter.

Counsel for appellant offered in evidence with the deed the assessment under which the sale was made on which the whole of section 8 (the same being a fractional section) was assessed, the assessment being as follows:

"Thomas R. Dansby, lot 1, section 8, township 12, range 17.
Cornelius Dowd, lot 7, section 8, township 12, range 17.
Cornelius Dowd, balance section 8, township 12, range 17."

Upon this evidence counsel argues that the assessment, the sale and conveyance to the state, and the conveyance from the state to complainant, are to be looked at as parts of one whole, each supplementing and explaining the other, and that, so considered, there is no ambiguity in the deed. Counsel would, under this construction, read the assessment-roll, so far as it refers to this land, about as follows: "Balance of section 8, being all of said section except lots one and seven," and then read the conveyance to the state and from the state to complainant, as "balance of section 8, township 12, range 17, as assessed for the taxes of the year 1874."

It is evident that if the deed alone can be looked to, it is void for uncertainty, for the words "balance of section 8, township 12, range 17" present a palpable and patent ambiguity, for the face of the deed discloses that the subject-matter cannot be known from the description alone. We have been unable to discover any authority for the proposi-

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tion advanced by counsel that the assessment-roll is to be taken as a part of the deed, though not referred to in it. The assessment of the land, being essential to the exercise of the power of sale, is referred to in conveyances by tax-collectors as showing the existence of the power to sell, and that the sale is in execution of the power given by the roll; but a somewhat protracted examination of the text-books and decisions has failed to discover any case in which a conveyance under a tax-sale presenting a patent ambiguity is held to be aided by the fact that the description of the lands in the deed is also found on the roll, and that the roll is found to refer to some other fact, the existence of which makes certain the otherwise ambiguous description of the land.

In *Bowers* v. *Andrews*, 52 Miss., 596, the description of the land was, "lot and residence in Madison Station, for the taxes assessed to the reputed owner thereof, Thomas McMahon, for the year 1871." It was held that the words "for the taxes assessed to the reputed owner," etc., were used to state the reason and authority of the act, and not as descriptive of the thing sold. But Chalmers, J., delivered a concurring opinion, in which, after stating that the words above quoted were not used as descriptive of the thing sold, proceeded to show that, if they should be read as a reference to the tax-roll as containing a more particular description of the land sold, the deed would not be aided, since the description on the roll was precisely that in the deed. Counsel for appellant treat this discursive suggestion of the judge as authority for the proposition that the deed may be aided by the roll, a conclusion which is not supported by the decision.

We are unable to perceive upon what principle the defective deed can be aided by the description of the property on the roll. In *Kelly* v. *Reed*, 57 Miss., 89, Judge George intimated an inclination on his part to aid an insufficient description of chattels in a mortgage by reading therein, by necessary im-

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plication, the statement that the property conveyed was the property of the grantor, but yielded to the contrary view entertained by his associates, and held the conveyance void. So in this case, we think it not permissible to read into the deed a statement that the land sold is that assessed to Cornelius Dowd in section 8, other than lots 1, 7 and 8. The deed must stand alone, for it does not refer to any other thing in aid of the description, and, standing alone, it is void for uncertainty.

Being unable to determine what land was sold for taxes, it is manifest that the lapse of time has not obviated the difficulty, and that section 1709 of the code of 1871, which declared that "no suit shall be commenced in any court in this state to invalidate any tax-titles to lands after three years from the time said land was sold for taxes," did not cure the defect. Looking at the deed to complainant, we do not know what land was sold for taxes, and we cannot say that the deed means now, aided by the statute, any thing more than it did originally.

The decree is affirmed.

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IRIS WALKER v. C. I. MARSEILLES.

1. EVIDENCE. *Declarations against interest. Replevin.*

In an action to recover personal property, it is error to exclude testimony for plaintiff that the person, since deceased, under whom defendant claims title, had stated, before defendant's claim arose, that the property was not his, but plaintiff's. *Graham* v. *Busby*, 34 Miss., 272.

2. HUSBAND AND WIFE. *Transfers between. Code* 1880, § 1178, *not retroactive.*

Section 1178, code 1880, declaring invalid all unrecorded transfers between husband and wife, does not affect transactions prior to the adoption of the code.

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Statement of the case.

3. SAME. *Gift in another state. Conflict of laws.*

A statute of Alabama, under which an unrecorded transfer between husband and wife, though good as between the parties, is void as to creditors and purchasers, cannot have any operation as to transactions made after removal of the parties and property to this state.

4. PERSONAL PROPERTY. *Purchase by wife. Payment by husband. Title.*

The title of the wife to personal property bought by her is not affected by the mere act of her husband in afterward giving his note for the purchase-money, and paying it out of the proceeds of crops grown on his land.

FROM the circuit court of Monroe county.

HON. LOCK E. HOUSTON, Judge.

This is an action of replevin, begun in the justice court, to recover a mare, two colts and several head of cattle. The mare and colts are admitted to be the offspring of a mare owned, in 1882, by one Bransford. Iris Walker claims to have purchased this mare from Bransford in 1883, the trade being verbal and on a credit. Bransford testified that the sale was made to Iris, but that he afterwards took a note of Ike Walker, her husband, for the agreed price, because he was the head of the family, and owned the farm on which the mare was to be used. The note was paid partly by Iris and partly by Ike Walker out of the proceeds of his farm, and the note, when paid, was surrendered to him.

Marseilles, the defendant, claims all the property in controversy, under a bill of sale executed by Ike Walker, who died shortly after executing it, and before this suit was begun. It was shown in behalf of the defendant on the trial that Ike Walker claimed to own all the stock, and had incumbered them in favor of his creditors. Plaintiff, however, introduced the testimony of Dr. J. C. Word, that, before selling to defendant, Ike Walker declared to him that he did not own the mare and colt, and that they were the property of his wife. This, and other evidence of the same purport, was excluded, on the objection of defendant, and this action of

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Brief for appellant.

the court presents the only question passed on in this court relative to the disputed ownership of the horses.

As stated above, Marseilles claims the cattle under a bill of sale from Ike Walker, while Iris Walker claims them under a written, but unrecorded, deed of gift, signed and executed in Alabama by Ike Walker, in 1871, conveying to her three cows, from which she claims to have raised the cattle in controversy. At that time they were resident citizens of Alabama, but afterwards removed, with their effects, including the cattle, to this state.

The instructions for defendant the giving of which the court holds were erroneous, are as follows:

"2. The court charges the jury that any deed or assignment of property between husband and wife must be acknowledged and recorded, otherwise such deeds are void as to creditors without notice, and do not confer any title; and if they find that the deed of gift from Ike Walker to Iris Walker of the cattle was not recorded, then the jury will find for defendant as to the cattle.

"3. The court charges the jury that if they believe, from the testimony, that Ike Walker, the husband, gave his note for the horses bought of Mr. Bransford, and that Ike Walker rented the lands on which the crops were grown that paid for said horses, then this placed the legal title of said horses in Ike Walker, and he had the right to mortgage or sell said horses, and if they believe he did sell them to Marseilles, they will find for defendant."

Judgment for defendant. Motion for new trial overruled, and plaintiff appeals.

R. A. Word, for appellant.

1. The testimony of Dr. Word was competent. Ike Walker's declarations in disparagement of his own title were competent after his death. *Whitfield* v. *Whitfield*, 40 Miss., 352; 1 Greenl. Ev., §§ 109, 190, 191.

2. It was error to grant the second instruction for defend-

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ant. The gift between the husband and wife was in 1871, when our law did not require a transfer to be acknowledged or recorded. The code of 1880 cannot apply to the contract previously made.

3. The third instruction is erroneous. It is not a question of law whether Bransford sold the mare to the husband or to the wife, but a question of fact. Newmark on Sales, § 156; 1 Parsons on Contracts, 528; *Myrick* v. *Wills*, 52 Miss., 149. The testimony conclusively shows the sale to the appellant.

Gilleylen & Leftwich, on the same side.

1. The taking of the note of the husband for the sale to the wife did not make him the purchaser. That the husband afterward made a payment, did not affect the legal title. *Henry* v. *Dillard*, 68 Miss., 536; *Ohleyer* v. *Bernheim*, 67 *Ib.*, 75.

2. It was error to exclude the testimony of Word and others as to the statements made by Ike Walker, now deceased, and against his interest. 40 Miss., 369; 1 Greenl. Ev., §§ 109, 190, 191. The gift of the cattle by Ike Walker to his wife, made in Alabama, was good as between the parties. Possession was delivered to her, and has been kept up continuously in this state. See Tied. on Sales, § 11; *Carradine* v. *Carradine*, 58 Miss., 286; Benjamin on Sales, 97.

Clifton & Eckford, for appellee.

1. The written deed of gift was never acknowledged or recorded, and should have been excluded from the jury. Code 1880, § 1178; *Gregory* v. *Dobbs*, 60 Miss., 549. The fact that it was executed in Alabama makes no difference, as the law of Alabama at that time required such instruments to be acknowledged and recorded, or they would be void against creditors or purchasers.

2. The testimony clearly shows that Ike Walker bought the mare from Bransford. He owned the farm, and gave his note, and paid the purchase-money. We submit, therefore that the third instruction is correct. See *Hamilton* v. *Booth*, 55 Miss., 60; *Walker* v. *Blackwell*, MS. Op..

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Opinion of the court.

3. The declarations made by Ike Walker, without appellee's knowledge were not competent evidence. If it was error to exclude this testimony, this court will not reverse, since the proof shows clearly that the stock and cattle were owned by Ike Walker, and not his wife.

COOPER, J., delivered the opinion of the court.

It was error to exclude the testimony of Dr. J. C. Word to the effect that Ike Walker, under whom the defendant claims, declared in his life-time that the horses in controversy were not his property, but belonged to the appellant. *Brown* v. *McGraw*, 12 S. & M., 267; *Graham* v. *Busby*, 34 Miss., 272.

The second instruction for the defendant should have been refused. The transfer of the cattle from Ike Walker to his wife was long anterior to the operation of the code of 1880, in which, for the first time, the provision declaring the invalidity of unrecorded transfers from the husband to the wife appeared.

If the gift was made while the parties resided in Alabama, as the plaintiff testified, it was good as between the parties, and the provisions of the code of that state, §§ 1561 and 1562, could have no operation after the persons and property came under the operation of our laws. The code of 1880 related to transfers made after its adoption, and had no effect upon past transactions.

The third instruction for the defendant is also erroneous. If the wife bought the horse from Mr. Bransford, as she testified she did, her title thereto would not have been affected, even though the husband afterwards gave his note for the purchase-money, and owned the land upon which was grown the crops from the proceeds of which the money was raised which paid for the horse. The horse would yet have been the property of the plaintiff, notwithstanding the husband paid the price she had promised to give.

The judgment is reversed.

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Statement of the case.

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MARY V. DUVAL v. FANNIE E. NEAL.

1. USURY. *Joint venture. Sharing profits.*

A contract by which complainant is to advance money to publish and introduce defendant's book, and, in consideration thereof, is to be paid his advances, with legal interest, out of the net profits, if any, and also one-half of such profits, imposes no personal liability on defendant, and is not usurious.

FROM the chancery court of Panola county.

HON. B. T. KIMBROUGH, Chancellor.

Appeal from decree overruling a demurrer. Appellee, Fannie E. Neal, filed her bill against appellant, Mary V. Duval, alleging that the latter had written a book, entitled "History of Mississippi," and had the same copyrighted; but, being unable to pay for publishing the book and introducing it to the public, sought and obtained from complainant advances for that purpose. The agreement between them stipulated that complainant should furnish $500, to be applied toward the publication of the book, and, in consideration thereof, should receive all the net receipts from sales of the book until the said sum by her advanced should be repaid, with lawful interest, and, besides, should forever own one-half interest in the book. The bill alleges that complainant advanced, under this contract, more than $1,100, the advances over $500, the stipulated amount, having been found necessary to procure the publication; that complainant had received the greater part of the money derived from sales, but there was still due $464; that defendant was purposing and preparing to issue a new edition of the book, by which the old one would be superseded and rendered valueless; that defendant denies all right of complainant in the new edition, and has instructed the publishers not to furnish any more copies of the old edition to complainant, or allow

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Brief for appellant.

her the use of the copy plates. Complainant avers that she is entitled to all the proceeds of the book until her advances are repaid, and that she is a half-owner in the book, and defendant has no right to supersede it with a new edition without complainant's consent; and, if a new edition is issued, complainant will also have a half-interest in it.

The prayer is for an accounting, and for an injunction to prevent defendant from interfering with the publication and sale of the book in any manner prejudicial to complainant's interests, and for a receiver.

Defendant demurred to the bill, assigning numerous grounds, chiefly that the contract was usurious. Demurrer overruled, and defendant appeals.

Shands & Johnson, for appellant.

1. The case turns entirely upon the construction of the written contract. Appellant contends that it merely created a lien for $500 advanced to her by appellee. No partnership is created. The $500 is a mere debt due, and is to be repaid with interest. It creates a personal liability on appellant. The parties are not engaged in a joint venture. Appellee risks nothing, pays none of the expenses, and is interested in the profits only as a means of compensation for advances. 52 Ill., 219; 47 *Ib.*, 178; 97 Mass., 230; 34 N. W. Rep., 419; 54 Mich., 9; 76 N. Y., 55; 87 *Ib.*, 33; 51 Am. Rep., 614; 53 Vt., 669.

2. The contract is usurious. Such contracts are often confounded with partnerships. 1 Lindley on Part., 16. The half-interest in the book is compensation over and above the interest. It is not necessary that the additional interest be stipulated to be paid in money. 37 Am. Dec., 642; 20 *Ib.*, 300. At most, appellee has only a lien for $500, and such other advances as were necessary to protect her lien.

Haynes & Hays, on the same side,

In support of the contention that the contract is usurious,

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cited 20 Am. Dec., 300; 2 Peters, 537; 5 Am. Dec., 424; 42 *Ib.*, 372; Parsons on Con., 427, 431; Waterman on Spec. Perf., § 216.

R. H. Taylor and *W. D. Miller*, for appellee.

The contract was not a loan of money. The advances were to be repaid only out of the "net receipts," and not in any event. The agreement created a partnership in a hazardous venture, and the objection as to usury must fail. 17 Am. & Eng. Enc. L., 852; 54 Cal., 463; 58 N. Y., 272; 7 Ohio St., 172; 29 Vt., 1; 53 Wis., 260; 40 Am. Rep., 770; 5 Ch. D., 458; 7 *Ib.*, 511; 116 N. Y., 61; Story on Part., 306.

Argued orally by *S. B. Hays*, for appellant.

WOODS, J., delivered the opinion of the court.

There is no usury in the written contract. It does not create any personal liability on appellant. She is not bound to answer for the money advanced by appellee. The sum advanced, in a doubtful and hazardous venture, is to be returned, if ever, out of the fruits of the enterprise, and appellant is under no personal liability to pay at all. The appellee advanced her money to enable the appellant's book to be put before the public, and, in consideration thereof, she takes a half-interest in any net profits that may spring from the venture, and stipulates for the return of her advancement, with legal interest, if the requisite funds shall ever arise in the prosecution of the enterprise; and this she might safely do, without subjecting herself to the charge of usury.

Her bill of complaint makes a fair case for the interposition of a chancery court, and the demurrer was properly overruled. If the statements of the bill are true, the appellee in clearly entitled to the relief prayed.

Affirmed

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Statement of the case.

PORTER & MCRAE v. R. A. STONE.

1. PARTITION OF PERSONALTY. *Tenant in common. Trustee. Code* 1880, § 2580.

After condition broken, a trustee in a deed of trust conveying an undivided interest in personalty, has such interest as will entitle him to maintain a suit for partition of the property under § 2580, code 1880, which provides that "any tenant in common of personal property" of less value than $150 may obtain partition thereof before a justice of the peace.

2. TRUST-DEED. *Cropper. Abandonment of crop. Advances.*

Where a laborer on shares who, to secure a debt for supplies to be advanced, has given a trust-deed on his share of the crop, abandons the work, and another takes his place, with the consent of the other share-owner and the holder of the trust-deed, and obtains supplies under it, but, after making and partly gathering the crop, also abandons it, the claim of the *cestui que trust* cannot be defeated by the act of such other share-owner.

FROM the circuit court of Tunica county.

HON. R. W. WILLIAMSON, Judge.

This was an action begun in the justice court for the partition of certain cotton under § 2580, code 1880. The petition alleges that the petitioner, R. A. Stone, trustee, and one Bennett are owners each of an undivided half-interest in the cotton; that appellants, Porter & McRae, claim to own the half-interest of Bennett. Pursuant to the statute, a writ of seizure was issued, and bond was given by Porter & McRae for the forthcoming of the cotton. Judgment was rendered in favor of the appellee, both in justice and circuit court, and, after motion for new trial overruled, Porter & McRae prosecute this appeal.

Briefly stated, the facts are as follows: Ben Smith and L. Bills rented a plantation in Tunica county for the year 1890, and sub-rented a part of it to Bennett, who employed one Thompson to work a part of the land on shares—*i. e.*, Thompson was to receive one-half of the crop, and Bennett the

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other half. Bennett made an arrangement with H. Banks & Co., merchants, to furnish supplies to Thompson, and the latter, to secure such advances, executed to Stone, trustee for H. Banks & Co., a trust-deed upon all his interest in the crop to be made under his contract. Bennett likewise executed a deed of trust to secure appellants, Porter & McRae, in the payment of advances already made, and to be made, by them to him, the trust-deed covering his interest in all the crops to be raised by him and his hands, tenants and employes during the year.

Thompson planted his crop, but abandoned it early in the summer; thereupon Bennett agreed with the wife of Thompson that she should work the crop which her husband had planted, and make and gather it for one-half of the same. She and Bennett went together to the store of Banks & Co. and acquainted them with the contract they had made with each other. There is some contradictory evidence as to what was said at this interview. There is some testimony that it was there verbally agreed by the parties that the wife of Thompson should make and gather the crop under his (Thompson's) contract, and also to the effect that Bennett requested Banks & Co. to continue to supply her during the rest of the year. Banks & Co. continued to furnish supplies and she made and partly gathered the crop of cotton, but then abandoned it in favor of Bennett, who turned it over to the trustee of appellants, who finished gathering the crop and now retains it, claiming it under Bennett's trust-deed to them. Thereupon, Stone, trustee for Banks & Co., after default in their deed of trust, commenced this partition proceeding. It was agreed by counsel for the respective parties that the one-half of the cotton grown upon the land worked by Thompson and afterwards by his wife, was worth more than the balance due Banks & Co., on their trust-deed, and further agreed that, if the circuit court, trying the cause without a jury, should hold that the trust-deed to Banks & Co. bound said one-half of the cotton, a moneyed judgment should

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Brief for appellant.

be rendered in favor of plaintiff against Porter & McRae. The court found in favor of the petitioner, Stone, and Porter & McRae prosecute this appeal.

The case involves a construction of § 2580, code 1880, which is as follows: "Any tenant in common of personal property, not exceeding in value one hundred and fifty dollars, may apply, by petition in writing, to any justice of the peace of the district in which such property may be, for a partition of it according to the rights of the several parties in interest; and, thereupon, all the co-tenants shall be summoned, and the rights of parties ascertained, and an order be made for a division of the property; or, if the property is incapable of division in kind according to the several interests, or if a sale and division of the proceeds will better promote the interests of parties, the justice of the peace shall order a sale of the property, and a division of its proceeds according to the rights of the parties in interest, and may designate a person to make such sale, and may issue execution specially framed to that end; and may make all orders necessary or proper to protect the rights of parties in interest, and to effect such sale and division of its proceeds."

F. A. Montgomery, for appellant.

1. The trustee is not such a tenant in common as may obtain partition under § 2580, code 1880. After condition broken, he is entitled to possession for the purpose of selling under the trust-deed. The grantor is still owner as against all others, and, against the trustee, is owner of the equity of redemption, and he alone is entitled to obtain partition.

2. If the landlord and share-laborer are tenants in common, appellee, holding through Thompson, can have no greater rights than he had. But Thompson was never owner of the crop, because his contract was an entirety. He was to work and gather the crop and own one-half of it, but, having abandoned it, he forfeited his contract. Thompson's wife, under a new contract, finished the crop and became the share-owner

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Opinion of the court.

with Bennett. She had never mortgaged her interest to Banks, but relinquished the crop, when gathered, to Bennett, and it at once became subject to appellants' trust-deed.

Calvin Perkins, for appellee.

1. The trustee, after condition broken, has such an interest as entitles him to maintain partition under the statute.

2. The contract between Thompson and Bennett made them tenants in common of the crop. *Betts* v. *Ratliff*, 50 Miss., 561; *Doty* v. *Heth*, 52 *Ib.*, 530. The mortgagee of Thompson succeeded to his interest, and could do any thing necessary to protect it. He completed the cropper's contract with the consent of the other share-owner.

CAMPBELL, C. J., delivered the opinion of the court.

This is a proceeding under § 2580 *et seq.* of the code of 1880, and presents two questions:

1. Has the trustee in a deed of trust on personal property, after breach of the condition, such interest in the subject of the trust as to entitle him to maintain such proceeding for partition?

2. Where a "cropper" on shares gives a deed of trust on his share, and under it obtains supplies, and abandons the work, and another takes his place, with the consent of the other share-owner and the holder of the deed of trust, and obtains supplies under it, and completes the making of the crop, and partly gathers it, and then abandons it, has the *cestui que trust* a claim on the crop not subject to be defeated by the act of the other share-owner?

We answer both questions affirmatively.

Affirmed.

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Statement of the case.

ANNIE M. TRIMBLE *v.* WASH DURHAM.

1. LANDLORD'S LIEN. *"Supplies." Mules sold tenant. Code* 1880, § 1301.

Mules sold by a landlord to his tenant, necessary to the making of a crop, are "supplies" within the meaning of § 1301, code 1880, giving a landlord a lien on the crops of the tenant for supplies furnished during the year.

2. SAME. *Waiver. Separate note for supplies.*

In such case, the taking by the landlord of a separate note for the price of the mules, reciting that he retained his lien on the mules and crop until the note is paid, is not a waiver of the landlord's lien.

FROM the circuit court of Coahoma county.

HON. R. W. WILLIAMSON, Judge.

Appellant rented land to one Hopson, taking his note for the agreed rent. She also sold him two mules with which to make a crop, taking a separate note for their price, and reciting in it that she retained a lien on the mules and crop until the note should be paid. Appellee, Durham, sub-rented a part of the land from Hopson. The latter did not make enough crop to pay for the mules, and Mrs. Trimble took possession of the cotton grown by Durham, the under-tenant, and applied it to the payment of the indebtedness for the mules, claiming a lien as landlord on all the agricultural products raised on the land for the rent due by him, and for the purchase-price of the mules, as "supplies furnished to the tenant" under § 1301, code 1880. Thereupon, Durham seized the cotton raised by him as under-tenant, contending that the mules sold by a landlord to the tenant are not "supplies;" and that, if mistaken in this, the landlord in this case had waived her landlord's lien by taking the separate note for the price of the mules, reciting in it that she reserved a lien on the crop and mules for its payment.

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Brief for appellee.

The court, a jury being waived, found for the plaintiff, Durham, and Mrs. Trimble, the landlord, prosecutes this appeal.

Section 1301, code 1880, which is construed by the court, is as follows: "Every lessor of land shall have a lien on all the agricultural products of the leased premises, however and by whomsoever produced, to secure the payment of the rent, and the fair market value of all advances made by him to his tenant for supplies for the tenant and others for whom he may contract, and for his business carried on upon the leased premises," etc.

Cook & Anderson, for appellant.

1. The language of § 1301 is clear, broad and sweeping. Nothing is more necessary to the making and marketing of a crop than a mule, and, when furnished a tenant, it is supplies "for his business carried on upon the leased premises.' It is difficult to imagine a negro farming in this country without a mule.

2. The taking of the second note did not in any way change the status of the parties. The law gave the lien, and the mere recital of the lien in the note cannot work a waiver of it.

Yerger & Yerger, for appellee.

1. The value of mules, that can make many crops, is not within the meaning of the statute which contemplates a lien on the crop for the year's supplies. The rent for the service of the mules for the year is different, and is within the spirit of the law. The crop is made liable for the rent and cost of its production. It will be noted that former statutes give a lien for "work-stock" and for "plantation supplies." The code of 1880 gives a lien for "advances" for supplies. See *Herman* v. *Perkins*, 52 Miss., 813; *Lumbley* v. *Gilruth*, 65 *Ib.* 23.

2. Taking other security than that given by the statut

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Opinion of the court.

waives the lien. *Gaines* v. *Keeton*, 68 Miss., 473; *Gobble* v. *Gale*, 41 Am. Dec., 222; 4 Wait's Ac. & Def., 323; 2 Sugden on Vendors, 384. The security reserved in the note was in the nature of a chattel mortgage. 2 Wait's Ac. & Def., 166; 2 Ark., 253; 9 Barb., 630.

WOODS, J., delivered the opinion of the court.

Mules sold by the landlord to his tenant are as necessary to the cultivation and production of crops as mules rented. If the tenant has no team, as is generally the case, there can be no cultivation or production of crops unless the landlord makes the advances necessary to supply the need. Why the lien exists for rent of mules, and not for the purchase-price of mules sold, we are unable to see. And why food and farming utensils, and provender for stock, are supplies, and the all-important mule is not, we are unable to see. Every thing furnished to make the crop, all advances for necessary and usual means and appliances for cultivating and producing the crop, are covered by the lien conferred by section 1301, code of 1880. Chiefest among these means and appliances the mule is fairly entitled to be ranked, and his rental value, or his purchase-price, alike are embraced in the word "supplies," in the section referred to.

The taking of a rent note of $720 for the use of the land for the year 1891, and the taking of a promissory note for $305 for the two mules, reciting that Mrs. Trimble retained her lien on the mules and crop until paid, was no waiver of her landlord's lien. They were each but simple evidences of the respective debts, and neither conferred upon her any other or greater security than she already had.

Reversed.

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Syllabus.

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ABIJAH HUNT v. H. J. WRIGHT.

1. CONSTITUTIONAL LAW. *Legislative procedure. Power of courts.*

Courts are bound to accept as valid legislative enactments, all such acts as are duly authenticated in the mode prescribed by the constitution, and which do not on their face bear evidence of a disregard of it. They cannot go behind such acts and consult the journals, or otherwise inquire if the legislature complied with the rules of procedure prescribed by the constitution for its observance. *Ex parte Wren*, 63 Miss., 512.

2. AMENDING LAWS. *Reference to title. Act* 1892. *Adopting code. Const.* 1890, § 61.

The act of April 2, 1892 (Laws, p. 60), by which the code of 1892 was adopted, was not reviving or amending a law "by reference to its title only" within the prohibition of § 61, constitution 1890, since that has reference only to the ordinary case of reviving or amending in the strict sense of the terms, and not to the adopting of a code or parts of a code.

3. LEGISLATURE; DISREGARD OF CONSTITUTION. *Power of courts. Const.* 1890, §§ 68, 70.

While § 68, constitution 1890, providing that "no revenue or appropriation bill shall be passed during the last five days of the session," and § 70 providing that "no revenue bill shall become a law except by a vote of at least three-fifths of the members present and voting," are obligatory on the legislature, its disregard of them is beyond the reach of the courts, which deal with what the legislature does, not with what it should have done or omitted in matters of procedure.

4. ADOPTION OF CODE 1892. *Absence of engrossed bills. Const.* 1890, §§ 59, 60.

The adoption of the code of 1892 by the act of April 2, 1892, by reference to duplicate copies of its several chapters, the chapters not being enrolled or engrossed, did not violate §§ 59 and 60 of the constitution of 1890, which declares how bills shall originate, and that no law shall be passed except by bill. Said act has all the forms and requirements of a bill, and the adoption of the chapters merely by reference and description is not prohibited by the constitution.

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Statement of the case.

FROM the circuit court of Sharkey county.

HON. J. D. GILLAND, Judge.

In July, 1892, the appellant, Hunt, being desirous of selling intoxicating liquors in Sharkey county in quantities not less than one or more than five gallons, tendered to appellee, Wright, sheriff and tax-collector of said county, the sum of $300, prescribed as a privilege tax upon said occupation by the act of 1890, and also tendered the collector's commissions, and demanded the issuance of the privilege tax license, which appellee refused to issue. Thereupon Hunt filed this petition for a mandamus against said tax-collector to require him to receive said money and issue the license.

By § 12 of the act of April 2, 1892, approving, adopting and enforcing the code of 1892, immediate operation was given to certain chapters of the code, among others, to chapter 37, entitled "Dram-shops," and chapter 108, entitled "Privilege Taxes." It is not contended in behalf of appellant that he is entitled, under the facts stated in his petition, to the license if these chapters were validly enacted and put in force. It will be seen that the effect of the petition is to test the constitutionality of the adoption of the code of 1892, and especially with reference to the above mentioned chapters.

Section 1 of the said act of April 2, 1892, commonly known as the enforcing act, is as follows:

"*Be it enacted by the legislature of the state of Mississippi*, That the annotated code of public statute laws of the state of Mississippi, prepared under authority of the constitutional convention of eighteen hundred and ninety, by R. H. Thompson, Geo. G. Dillard and R. B. Campbell, and reported to the legislature by them, and adopted by the two houses of the legislature, the draft in duplicate whereof, as adopted, being now in the hands of the clerk of the house and the secretary of the senate respectively, be, and the same is hereby, adopted and declared to be the code of Mississippi, to take effect and be of force as therein provided; and the duplicates thereof shall immediately, upon the approval of this act by

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Brief for appellant.

the governor, be deposited in the office of the secretary of state."

The several provisions of the constitution of 1890 which it is claimed were violated or disregarded by the legislature in adopting the code and enacting the above mentioned chapters, are sufficiently indicated in the opinion. The petition alleges that the duplicate copies of the code referred to in § 1 of the said enforcing act are printed copies, which have been erased, interleaved and altered to such an extent that it is almost impossible to ascertain definitely the meaning of the legislature; that said duplicates bear no sort of resemblance to enrolled or engrossed bills; that they do not, in fact, correspond with each other in every respect; that § 2 of the introductory chapter of the code, as it appears in one of the duplicate copies, provides for the repeal of all former repugnant statutes on the first day of *November*, 1892, while the other draft of the code provides for such repeal on the first day of *July*, 1892.

The defendant demurred to the petition, and from a judgment sustaining the demurrer and dismissing the petition Hunt appeals.

Murray F. Smith and *J. Hirsh*, for appellant.

The tendency of all recent constitutions has been to restrict the power of legislatures to embrace in one bill incongruous matters, or to pass laws embracing different subjects and affecting varied interest to such an extent as to render it impossible for members to act intelligently upon them. The constitution of 1890 is in line with these tendencies, and contains numerous provisions new to the organic law of this state. From sections 60 to 70, inclusive, will be found various restrictions upon the legislature not heretofore in our constitutions. In *Ex parte Wren*, 63 Miss., this court has said: "We would not shrink from the investigation of all questions of fact on the existence of which any statute depends."

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Brief for appellant.

The whole constitutional scheme contemplates that the governor is a constituent part of the legislature, and that he has a right to have measures presented in the shape of a bill, with a title clearly indicating the subject-matter to be passed on by him. See *People* v. *Bowen*, 21 N. Y., 517.

The legislation sought to be invalidated violates every one of the above sections. There was no bill putting the dram-shop chapter into effect according to the intent of the constitution. The title of the enforcing act is not a title indicating clearly the subject-matter to be legislated on. Nor did the constitutional convention of 1890 authorize a code to be prepared such as has been adopted.

The constitutional provisions are not merely directory. They are in line with no less than twenty-six state constitutions. Sutherland on Stat. Const., §§ 76, 79.

The legislature, by resorting to a single enforcing act, placed it beyond the power of the governor to approve a portion of the laws or reject a portion, for the constitution gives no such power, except in cases of appropriation bills. It is impossible to tell which copy of the code the governor acted upon, or how he got possession of one of these so-called authentic copies of the code. Section 1 of the enforcing act, did not contemplate that these copies should ever leave the hands of their respective custodians until the act should be approved by the governor.

It is true there are a few cases which hold that certain things may become a part of a law by being referred to in it, but there cannot be many cases in which this rule can apply. Cooley on Con. Lim., 169. The cases of *Dew* v. *Cunningham*, 28 Ala., 466; *Pulford* v. *Fire Department.*, 31 Mich., 458, and *Loan Association* v. *Richards*, 21 Ga., 592, do not warrant the court in going so far as to hold the legislation under consideration valid.

The court will take judicial notice that the legislature adjourned on the day the enforcing act was passed. Sutherland, Stat. Const., § 181. The passage of the revenue and appro-

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Brief for appellee.

priation bills within the last five days of the session was unconstitutional. Const. 1890, § 68.

T. M. Miller, attorney-general, for appellee.

The objection that the chapters on dram-shops and privilege taxes were passed within the last five days of the session cannot aid the appellant, even if it be conceded that section 68 of the constitution is mandatory on the legislature, since laws regulating the traffic in ardent spirits, though incidentally including revenue, are not revenue laws in any legal or constitutional sense. *Burch* v. *Mayor*, 42 Ga., 596. That such provisions are not mandatory, see 51 Cal., 624; 27 Ohio St., 102; *Washington* v. *Page*, 4 Cal., 388.

The contention that nothing can be declared law which is not actually embraced in an enrolled bill is not maintainable. It is only required that the matter which is to be law shall have the assent of the law-making power, and that such assent shall be expressed in the form of a bill, duly authenticated and enrolled. Thus, the statute which incorporated a military company by reference to its constitution and by-laws was held valid, notwithstanding said constitution and by-laws were not read in the two houses of the legislature as parts of the statute. Cooley, Con. Lim., 168, 169, citing *Dew* v. *Cunningham*, 28 Ala., 466; *Bibb County Loan Association* v. *Richards*, 21 Ga., 592; *Pulford* v. *Fire Department*, 31 Mich., 458.

The framers of our constitution were familiar with the existing practice of making general as well as particular enactments by reference only. The constitution of 1890 placed no limitation upon this, except that found in section 61, declaring that no law shall be revived or amended by reference to its title only. If the constitution of 1890 prohibits the adoption of the code by reference, the constitution of 1865 did also, and the code of 1880 is invalid. The consequences of such a holding are appalling enough to put an end to the discussion.

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Opinion of the court.

The variance between the duplicates is immaterial. It is evident from the connection that *November* should be read *July*, as this conforms to the manifest intention and enactment of the legislature. I submit that the appeal is without merit.

Argued orally by *Murray F. Smith*, for appellant.

CAMPBELL, C. J., delivered the opinion of the court.

This case presents the question whether chapters 37 and 108 of the code of 1892 are in force. One is the "*dram-shop*" chapter, and the other is entitled "*privilege taxes.*" It is admitted that an act to adopt and make of force the code was duly passed and approved on April 2, 1892, which declared the above-mentioned chapters in force, but the claim is that this was ineffectual, because the chapters were adopted by their titles only, and without their contents being set forth, and because of divers specific objections, having reference to the method of procedure by the legislature in dealing with the several chapters constituting the code; and that these particular chapters were passed within the last five days of the session, and did not receive three-fifths of the votes of the members of each house voting; that there is no enrolled bill in existence containing any part of said chapters, nor any such bill signed by the presiding officers of the two houses and the governor, and authenticated as the constitution requires; that there is doubt and uncertainty as to what is the code adopted, and material variance in certain particulars between two authorized versions of it, but it is not alleged that these versions differ as to the two chapters mentioned.

Most of the objections urged by appellant are fully met by the decision of this court in *Ex parte Wren*, 63 Miss., 512, in which it was declared that the legislature, as a co-ordinate department of the state government, invested by the constitution with legislative power, is not subject to supervision and revision by the courts as to those rules of procedure

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prescribed by the constitution for its observance, because while those rules are all *authoritative* and *mandatory* to legislators, who are sworn to note and observe them, they exhaust themselves upon legislators, and are not for the consideration of courts, which cannot explore legislative journals to see if all the directions of the constitution were observed, but must accept as legislative enactments, duly passed as prescribed by the constitution, all such acts as are duly authenticated as such in the mode prescribed by it. The opinion of the court in that case contains a full presentation of our views on the important question discussed, and with its reasoning and conclusion we are still content. It seems, too, that the constitutional convention of 1890 adopted those views, for all of the provisions of the constitution of 1869 with reference to which that case was decided, were re-adopted as part of the constitution of 1890, without any indication of purpose to introduce a new rule on this important subject; and, while the new constitution contains new provisions restrictive of legislative power, and designed to guard against evils in legislative proceedings, there is nothing to suggest that the courts are to *pry into* the record of the proceedings of the legislature to ascertain if it regarded rules prescribed for its observance while about its business. So far as the new constitution contains the provisions of the old, it must be held to have adopted with them the view of this court with reference to them as announced in the case mentioned.

The question is: Do the new provisions alter the rule heretofore announced? Those relied on are all the sections from number sixty to seventy-one inclusive. Those particularly mentioned as supporting the claim of appellant are section 60, which declares that "no law shall be passed, except by bill;" section 61, "No law shall be revived or amended by reference to its title only, but the section or sections, as amended or revived, shall be inserted at length;" section 63, "Appropriation and revenue bills shall, etc., . . . and no such bills shall be passed during the last five days of the se

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sion;" section 70, "No revenue bill shall become a law, except by a vote of at least three-fifths of the members of each house present and voting;" section 71, "Every bill shall have a title, and the title ought to indicate clearly the subject-matter," etc.

All the provisions, old and new, relating to this matter, are contained in article 4 of the constitution of 1890. That article is headed "*Legislative Department*," and is subdivided with a heading to each subdivision. Among these is found, "*Rules of Procedure*," and under this subdivision is grouped sections 54 to 77, inclusive, including all from which it is contended that the code chapters must be pronounced invalid as having not been adopted. Among these provisions are certainly some that are not mere rules of procedure addressed to and ending with the members of the legislature. An example of this is found in section 61: "No law shall be revived or amended by its title only," etc. An act of the legislature disregarding this, would be disregarded by the courts. That would present the question of the validity of a completed enactment. Another example is section 63: "No appropriation bill shall be passed . . . which does not fix definitely the maximum sum thereby authorized to be drawn from the treasury." Another is section 64: "No bill . . . to make appropriations . . . out of the state treasury shall continue in force more than six months after," etc. Section 75 is: "No law of a general nature, unless therein otherwise provided, shall be enforced until sixty days after its passage." These provisions pertain to the operation of acts of the legislature, passed with due regard to all the requirements of the constitution, and would seem to be out of place among rules of procedure. With those matters courts must deal, but their duty as to them, as in all other cases, commences after the termination of legislative action. Then the duty of the judicial department begins. It is not an overseer of the legislature during its labors, but it takes its completed work and tries it by the

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constitution, starting with the conclusive and irrebuttable presumption, that, as to all the requirements of that instrument, they who swore to observe it, did so. Every act which bears on its face evidence of disregard of the constitution, invites, and must receive, the condemnation of all who are called on to deal with it, and that is the test.

The adoption of the code by the act of April 2, 1892, was not invalid, as prohibited by section 61, which says: "No law shall be revived or amended by its title only," etc. This section is aimed at a well-known evil in legislation. But, adopting and declaring of force the code, or certain chapters of it, was not *reviving* or *amending* within the meaning of this section. Besides, it appears that the matter of the code was inserted at length and considered *in extenso*. The code does not *amend* or *revive* any law by reference to its title only. Nearly all of the code, excluding new subjects, was law before, in the very form in which it reproduces it, and would have continued in full force, if the code of 1892 had not been adopted; and, wherein former laws are amended by it, it was competent to adopt it by an act referring to it as an existing thing. This was not *reviving* or *amending* laws by reference to title only, in the meaning of section 61, which has no application to adopting a code or parts of one, but to the ordinary case of *reviving* or *amending* a law in the strict sense of these terms. All familiar with the subject know the particular evil intended to be corrected by this provision, and it is plain that the prohibition does not embrace the case we are now considering, for it is not within the evil, and, therefore, not within the remedy.

The declaration of section 68 that no appropriation or revenue bill shall be passed during the last five days of the session, has reference to being passed by the legislature, and does not refer to approval by the governor. The two houses pass bills. The governor approves, and he may approve at any time when the legislature is in session. While the provision of section 68 is obligatory on the legislature, its dis

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regard of it is beyond the reach of courts, which are not keepers of the consciences of legislators, and deal only with what they do, and not what they should have done or omitted. We would not be understood as holding that the "*dram-shop*" law is a revenue bill or law, but, if it was, it would not be affected by what is alleged as to when it was passed. The fact that it was passed within the last five days of the session, and did not receive three-fifths of the votes of members voting, if it be a fact, is not a matter of which courts will take cognizance.

If members of the legislature violate their oaths by disregarding the plain directions of the constitution, the courts are powerless to redress the wrong, except as to matters apparent in their finished action. The constitution, as to mere rules of procedure prescribed for the legislature, is committed to the members individually and collectively, and the houses are intended as a mutual check, and the governor on both, and courts will not inquire into the antecedents of legislative enactments, and have no claim to be present at the parturition. Their duty begins when legislative travail is over.

That there is no enrolled bill on "*dram-shops*" and "*privilege taxes*" makes no difference, since none such is required by the constitution, which has nothing about enrolled or engrossed bills. It is undeniable that there is an enactment adopting and putting in force as a code certain printed or written chapters. That enactment has all the forms and requirements of law as prescribed by the constitution, and all is made law by it which it could and does declare to be.

A bill is a written or printed draft of a proposed law. The constitution, without defining, says, "Bills may originate in either house," etc., and has various provisions for dealing with them (section 59); and in section 60 says, "No law shall be passed except by bill"—*i. e.*, except by conforming to the preceding requirements as to passing bills.

It is true that journals are required to be kept, and yeas and nays are to be entered on them as provided, but that is

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not that courts may scrutinize the daily doings of the legislature. The purpose is widely different. The houses have complete control of their journals, both as to what they shall contain and their publication, which shows that matters of mere procedure are committed to the keeping of legislators, all of whom are bound by a most solemn oath to observe and maintain the constitution in all its provisions; and, in order to insure familiarity with the instrument thus committed to their charge, each member is required, on qualifying, to swear that he will, soon after being sworn as a member, "carefully read (or have read to him) the constitution, and will endeavor to note, and as a legislator to execute, all the requirements thereof imposed on the legislature."

We have already said that the adoption of the chapters by reference and description as existing is not within the prohibition of section 61, and therefore they became law as declared.

Questions may arise as to what was embraced in the adopting act. The identity and authenticity of what is alleged to be the text of the code may arise, and perhaps present difficulty when they arise, but it is not claimed that there is any doubt or uncertainty as to the "*dram-shop*" law or that on the subject of "*privilege taxes*," and any other does not concern the appellant, and cannot avail him in this appeal. It is for the courts, as questions arise, to ascertain what is the law. The printed code is evidence, but it is not the best evidence. Resort will be made to the "*duplicate*" described in the act of April 2, 1892, adopting the code, in the office of the secretary of state, in case of alleged inaccuracy as to the text of the printed code. If, in any case, it shall be found that the "*duplicates*" mentioned by the adopting act do not agree, it will be time then to consider the effect of the discrepancy. "Sufficient unto the day is the evil thereof." None of the objections made to the chapters of the code under consideration are valid, and all combined are ineffectual.

Affirmed.

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Syllabus.

THE STATE, ON THE RELATION OF THE DISTRICT ATTORNEY, v. W. S. LOVELL.

1. VACANCY IN OFFICE. *Justice of the peace. Constitution* 1890, § 103.

The mode of filling vacancies in the office of justice of the peace is, by § 103, constitution 1890, committed entirely to the legislature.

2. SAME. *Legislative authority. Code* 1892, §§ 3683, 3686.

The office of justice of the peace is a "county *district* office" under § 3683, code 1892. It is not embraced in § 3686, which authorizes the governor to fill, by appointment, any vacancy in a "county office." Therefore, he is not authorized by it to fill, by appointment, a vacancy in the office of justice of the peace, though the board of supervisors has failed for more than forty days to provide for filling such vacancy by election.

3. SAME. *Case of emergency. Constitution* 1890, § 103.

But in such case, the local authorities not having filled the vacancy within the time required by law, and the legislature having failed to provide for filling such a vacancy otherwise, a case of emergency arises, authorizing the governor to fill it by provisional appointment, under § 103 of the constitution.

4. PROVISIONAL APPOINTMENT. *Vacancy regularly filled. Code* 1892, § 3683.

In such case, where the unexpired term exceeds two years, the appointment, being provisional, should not be for the unexpired term, but only "until the vacancy is regularly filled;" and it should be filled by special election, as required by § 3683, code 1892.

5. APPOINTMENT PENDING CONTROVERSY. *Validity. Vacancy.*

Where, to fill a vacancy, an election is held which is irregular, but a commission is issued to the successful candidate, who qualifies and enters upon the duties of the office, and afterwards litigation arises involving the validity of the election, whereupon such person, anticipating an adverse decision, is appointed by the governor as if there had been no election, the fact that this is done pending the controversy does not affect the validity of his appointment.

6. SAME. *Duty of executive. Validity of acts. Review by courts.*

Such appointment, pending the controversy, is not an invasion by the executive of the judicial department. Charged with the duty of executing the laws and making appointments in proper cases, the governor

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Statement of the case.

must decide for himself whether a vacancy exists in a given case, his acts being subject to review by the courts. If he assumes to appoint when there is no vacancy, or when the power to appoint does not exist, it will confer no right.

FROM the circuit court of Warren county.

HON. J. D. GILLAND, Judge.

Information in the nature of a *quo warranto* by the state, on the relation of the district attorney of the ninth district of Mississippi, against appellee, W. S. Lovell. The information alleges that at the general election held in November, 1891, one Convillion was elected justice of the peace for the third district of Warren county for a term of four years, commencing the first Tuesday after the first Monday of January, 1892; that he failed to qualify, and that no action was taken to fill the vacancy until the 6th day of May, 1892, when the board of supervisors declared a vacancy to exist, and ordered an election to fill it, but failed to name the day upon which the election was to be held; that the election commissioners of the county, erroneously believing that they had the power to name the day, fixed the election for May 25th, 1892, on which day an election was held, when appellee, W. S. Lovell, was by them declared elected, but, before a certificate of election was issued, the commissioners were enjoined from issuing it; that the returns of said election were, however, forwarded to the secretary of state, and that the governor, through mistake of law, caused a commission to issue to said Lovell, who, thereupon, qualified as justice of the peace; that, thereupon, the proceedings in this case were instituted against said Lovell before the circuit judge in vacation, July 1st, 1892. The information further shows that while said *quo warranto* proceedings were pending, the governor, without waiting for a decision by the court as to the validity of said election, through error of law, appointed the said Lovell justice of the peace for the whole term ending January, 1896, and issued a commission accordingly. This appointment the relator alleges was without authority, wherefore it was prayed that

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the defendant should be debarred of exercising the functions of said office.

A demurrer to the information was sustained, and the case dismissed. Relator appeals.

Pat. Henry and *J. M. Gibson*, for appellant.

The governor had no power to appoint appellee, there being no vacancy caused by removal from office.

The board of supervisors having ordered an election to fill the vacancy of the unexpired term, the governor could not interfere and fill the office by appointment, except for a temporary officer. The form of an election having been gone through with, and a commission having issued to Lovell, the governor had no power to declare this *de facto* officer an usurper in advance of a decision by the courts. He could not have issued a valid commission to an appointee for the unexpired term, it being more than two years.

The words "remove and appoint," in § 139 of the constitution, must be taken together, and the governor can only appoint in such cases when he has removed the officer.

The authority of the governor, under § 103 of the constitution, is limited to making a *temporary* appointment, the officer to hold until an election. He cannot appoint officers made elective by the constitution, except to fill a temporary vacancy pending an election, unless it be in a case where he has removed an officer.

Section 3686, code 1892, is unconstitutional, being framed upon a too liberal construction of § 139 of the constitution. But, if it is not unconstitutional, the governor could not issue a commission in this instance, because there was no vacancy existing at the time. There had been the form of an election, and the commission had issued, and Lovell had qualified, and was performing the duties of the office. It was then for a court of competent jurisdiction to decide whether or not the office was vacant. The constitution wisely divorces the judicial functions from those of the ex-

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Brief for appellee.

ecutive. So long as there was an officer, or a person acting as such, there was no vacancy, and the governor had no power to declare one. *Brady* v. *West*, 50 Miss., 68; 9 Paige Ch. (N. Y.), 507; 20 Cal., 503; 37 *Ib*, 614; 49 *Ib.*, 407; 2 Md., 341.

If the view of the law as held by the circuit court be correct, the governor can take a case out of the hands of the court, and decide the legality of an election. A corrupt governor could install himself, and, with the power to name the officers of election and to decide what elections are legal, he would be furnished with a machine to perpetuate infamy. From the present executive there is nothing to fear, but it would be dangerous to hold that the governor has such a power.

The last commission was void, and should be so declared. On this point, see Cooley on Const. Lim., 779.

The people, by acquiescence, could have waived the irregularity, and would be held to have waived it in the absence of the proceeding instituted by the state. *State* v. *Ruff*, 29 Pac. R., 999.

Miller, Smith & Hirsh, for appellee.

1. The order providing for a special election, at which appellee was elected, was a nullity, because it failed to fix a day for the election. The office remained vacant in spite of the fact that Lovell had entered therein, and, but for § 3686 code 1892, it would have been the duty of the board of supervisors to order an election to fill it.

There was occasion for the judicial declaration of a vacancy. The illegal election left the vacancy as before.

The error of opposite counsel is in supposing that the *de facto* principle, which applies only in favor of third persons may preclude a vacancy in an office.

It is a pure fancy that, in superseding a former void commission, the executive invaded the judicial department. Had

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a person other than Lovell been appointed, the second commission would have given the holder a right to the office.

The state did not acquiesce in a *de facto* claim innocently set up by Lovell, but instituted proceedings to oust him. There was nothing to prevent him from anticipating a judgment and surrendering his void claim, which he did by qualifying under the second commission.

There is no force in the suggestion that the governor could usurp the functions of the court should he assume to fill the vacancy when none existed. His action would be annulled, and would prejudice no one.

2. Section 3686, code 1892, is fully authorized by § 103 of the constitution. There is nothing in the constitution requiring that vacancies, in cases like this, shall be filled by a special election. The mode of filling the vacancy is committed to the legislature, which may provide for election or appointment to fill vacancies. In cases of emergency, the constitution gives the governor power to make provisional appointments, and, in cases of special election, provides for the appointee to hold until his successor is qualified, after a general election.

If the appointment in this case should only have been temporary, to last until an election, still the court could not have ousted defendant before such election. The judgment appealed from is right, whether we rely upon § 103 of the constitution or upon § 3686, code 1892.

CAMPBELL, C. J., delivered the opinion of the court.

By § 171 of the constitution of 1890, justices of the peace are to be chosen in each county, in the manner provided by law, for each district. "Chosen" is used in the sense of *selected*, as shown by § 138, also §§ 135, 168. The constitution does not provide for the election of county officers, including justices of the peace, by the qualified electors. They are to be chosen or selected as provided by law, and the legislature might, in pursuance of the constitution, pro-

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vide for the selection of any of these officers by the governor, the circuit judge, the chancellor or in any other way provided by law. The mode of filling all vacancies in all offices not specifically provided for by the constitution (and those provided for by the constitution itself are few, and do not include justice of the peace or any county office), is left, by express provision, to the legislature (§ 103 of the constitution), which thus has the amplest power, both as to the selection of these officers and filling vacancies in these offices. In the exercise of this power, the legislature has provided for the election by qualified electors in districts, of justices of the peace, and it has also provided for filling vacancies in any county or county district office (code 1892, § 3683), with the further provision for the governor to fill the vacancy by appointment, if forty days have been permitted to elapse without the action of the proper local authority having filled the vacancy. The authority of the legislature to so provide is indisputable, as already shown. All talk of the liberties of the people as to this is idle, for, by the constitution, the whole matter is committed to the legislature as to the selection and removal of county officers, and filling vacancies.

The validity of § 3683 of the code is unquestionable, but serious doubt arises as to whether justices of the peace, chosen for districts in a county, are county officers, in view of the fact that in § 3683 a distinction is made between a county office and a "county *district* office," and in § 3686 there is no mention of a "county district office." A district may be a portion of a county. It is spoken of as such by the constitution in § 170, which provides for dividing each county "into five districts," and for the selection of a supervisor in each district, to constitute the board of supervisors of the county. Then immediately follows § 171, which provides for justices of the peace "for each district," meaning probably, the districts provided for by § 170. It is inconceivable that the legislative purpose was to omit supervisors and justices of the peace and constables from the list of offices

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vacancies in which should be filled by the governor, as provided by § 3686, for there is as much propriety, and perhaps as much necessity, for having these offices filled as many of those provided for in terms. It is not supposable that the legislature intended to secure the avoidance of vacancies in city, town, and village offices, and in comparatively useless county offices, and intentionally failed to provide for filling district offices in a county in case of neglect by the local authorities to fill them promptly. It must have resulted from inadvertence, as was the failure to provide for the filling of vacancies in state offices. § 3681. District offices in counties are certainly not named in § 3686.

The question arises, is this an omission which cannot be supplied by the court, or are district officers, of the kind spoken of, county officers, and included in the terms employed in § 3686 of the code of 1892? Upon the answer to this question depends the power of the governor to appoint; for while § 103 of the constitution gives power to the governor to appoint, in cases of emergency, to fill vacancies, and this is ample authority for him to act where the legislature has not provided for the case in pursuance of the same section, where the legislature has executed that power, and determined the mode of filling vacancies, the law must govern. In the exercise of the power given by § 103, the legislature enacted § 3683 of the code, and provided for filling vacancies in county and "county district" offices, where the term unexpired has more than two years to run, by election held by order of the board of supervisors. This section is qualified by § 3686, which provides for appointment, by the governor, to fill vacancies in certain offices in a certain contingency. Any office embraced by § 3683, and not embraced by § 3686, must be filled, as provided by the former, unaffected by the latter.

Justices of the peace are not county officers. They are chosen in and for districts, separate portions of counties, and have no county functions to perform. They are what § 3683

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denominates "county district" officers. If the code had no clearly drawn the distinction, it would perhaps have been allowable to interpret § 3686 as including justices of the peace in the expression "*county*" *office*, but as § 3683 makes the distinction plainly, and § 3686 enumerates the offices to be filled by the governor in a certain contingency, and omits "county district" offices in this enumeration, we are bound in deference to the rule that the enumeration of certain things excludes all not mentioned, to hold that the omitted offices are not included in § 3686. The language of § 3683 is that certain offices, including by name "county district office," shall, when vacant, be filled by election, if the unexpired term exceeds two years, and § 3686 says a vacancy in a county office not promptly filled as provided by § 3683 shall be filled by the governor. Section 3686 confers authority to appoint only as to the offices it mentions. It qualifies § 3683 only to the extent it expresses. It excludes "county district" offices, which that of justice of the peace is, and, as to this office, § 3683 must govern, and, by it, no appointment can lawfully be made by the governor to fill a vacancy in the office of justice of the peace.

The foregoing view is strengthened by considering the history of legislation on this subject. The code of 1880 specifically provided for filling a vacancy in the office of justice of the peace by election ordered by the board of supervisors or the president thereof (§ 2187), and it also provided for filling a vacancy in the office of constable. § 38 It then provided, by § 156, for filling a vacancy in any county office. Vacancies in the board of supervisors were directed to be filled by election, "as other county elections to fill vacancies." § 2131. The code of 1892, by § 3683, provides for vacancies in both county and "county district" offices; that is, all county offices, including, probably, boards of supervisors and justices of the peace and constables, who are "county district" officers in the nomenclature of the code. This is plainly the case, since no specific provision oth

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than that in § 3683 is made by it for filling vacancies in the offices of justices of the peace and constables. Section 3683 was intended for all, and includes all county and "county district offices." But, in enumerating offices to be filled by the governor, as provided by § 3686, it does not include all mentioned in § 3683, and excludes "county district" offices. It has no other provisions on the subject, except the two sections—3683 and 3686—which were adopted as a substitute for §§ 156, 388, 2131, 2187 of the code of 1880. By it provision is made for filling, by election, all county and "county district" offices, and for appointment by the governor to fill "county, city, town, or village offices;" but none is made for thus filling "county district" offices.

But while these views are, as we think, unanswerable, it is equally true that the constitution, by § 103, confers power on the governor, in cases of emergency, to make provisional appointments to fill all vacancies not provided for otherwise by the constitution or law; and as the vacancy in the office which is the subject of this contest was not filled in the mode provided by § 3683—within forty days, the time specified by § 3686, as that the lapse of which without filling vacancies, in county and municipal offices, creates an emergency in which the governor should act—a case existed for appointment by the governor. It was the duty of the board of supervisors to take steps promptly to fill the vacancy. It did not; and while, because of the omission in § 3686 commented on, the governor is not by it empowered to appoint in such case, because of such omission, he is authorized by the constitution to appoint. Where a statute, passed in pursuance of the constitution, covers the case, it must govern. In the absence of such statute, the constitution confers needed authority.

The fact that Lowell, who had gone into the office in pursuance of an election, said to be void, was appointed and commissioned instead of another, or that he was thus commissioned pending a contest as to his right to the office by virtue

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of the election, makes no difference as to the validity of hi appointment. That is the only question. If the electio was void, all had a right to anticipate its being so held, an to act on that assumption.

But, while § 103 of the constitution authorized an ap pointment by the governor, in the state of case presente it did not authorize a commission for the unexpired term but only "until the vacancy is regularly filled." It may and should, be filled as prescribed by § 3683 of the code- that is, by election ordered as therein provided for; and th commission of the governor authorizes the holding of th office until a person thus elected shall be duly qualifie This results necessarily from the fact that the governor power to appoint in this case rests alone upon § 103 of th constitution, and it authorizes only "*provisional appoin ments*"—*i. e.*, such as will meet the present needs in a emergency, and "to continue until the vacancy is regular filled." That means not filled at a regular election, but i accordance with law; and, where the law provides for special election, that is the mode of filling regularly co templated by the constitution. If no provision is made f filling vacancies by special election, the appointee of th governor would hold, necessarily, until the vacancy shou be filled at the next regular election, because, in no oth way could it be regularly filled. But where the law has pr vided for special elections to fill vacancies, they should filled in that way, and a provisional appointment will expi accordingly.

It is a mistake to regard the action of the governor making an appointment pending the controversy in cou and appointing the defendant, as an invasion by the exec tive of the functions and province of the judiciary. Charg with the duty to see that the laws are faithfully execute and with the duty of making appointments to fill vacanci in certain cases, the governor must necessarily decide f himself, in a given condition of things, whether or not

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vacancy exists which he should fill, and act according to his conclusion. This is but to discharge his duty. The validity of the appointment he makes, in any case, is a question for the courts, which, in our system, pass on the validity of legislative and executive acts, wherever they are involved in any controversy before the courts. Were an appointment made when no vacancy existed, or when the power to appoint did not exist, it would confer no legal rights on the appointee, as would be declared when brought to judgment before that branch of our government charged with the function and duty of finally deciding all questions arising under the constitution and laws of the state where the rights of litigants are involved. The legislature enacts, the executive executes, and the judicial department decides and adjudges, and it is then for the executive to uphold and execute the mandate of the judiciary, for that is the final expression of the will of the sovereign—the people—whose deputies the judges are, speaking their voice in deciding controversies.

Those engaged as the representatives of the people, in the three distinct departments into which, by the constitution, the powers of government are divided, must deal with whatever arises, and act according to their best judgment in every matter, and none can be charged with overstepping the line of duty who deals with a contingency presented for his action as appears to him to be right. He may err in judgment, and be wrong in his action, but he is not blamable for acting as he thinks right when called on to act. He would be blamable if he failed to act when called on. The best contrivance of human invention is to vest power to decide finally all questions arising under the constitution and laws in the judicial department, with which dispute must end until the sovereign shall, by direct intervention, change the decision made. Hence, the existence of a court of appeals for the correction of errors of inferior tribunals, based on the assumption that it, with increased opportunity for investigation, deliberation, and consideration, will correctly deter-

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mine and express the will of the people, the source of all power in government. Even it might possibly err, but it is necessary to lodge power to decide finally somewhere, and it has been vested in this court by our constitution, and its utterances must be accepted as the voice of the commonwealth, binding on all. With a king or queen, to whom no wrong can be imputed, and an omnipotent legislature, the judicial department is not altogether so important as with us. In our system of constitutional government, whose powers are distributed among three distinct departments, each is essential to the complete whole, like the different members of the human body, but with distinct and appropriate functions for each, and neither should shrink from or falter in the performance of the duty before it.

In this case the chief executive performed his duty in dealing with a vacancy in office, and this was not an invasion of the judicial department, which then was called on, in the pending suit, to pass judgment on the validity of the executive appointment, and thus the beauty of our system is exhibited and its harmonious operation illustrated.

Affirmed.

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BOARD OF SUPERVISORS OF QUITMAN COUNTY *v.* WILLIAM STRITZE ET AL.

COUNTY. *Ownership of land. Objection thereto. Sovereignty.*

Where real estate, not necessary for any of the purposes for which the county is authorized to acquire land, is donated to the board of supervisors, the title of the county is not void, but only voidable. Neither the grantor nor those claiming under him can question the county's right of ownership and disposition; the state only can object.

FROM the chancery court of Quitman county.
HON. W. R. TRIGG, Chancellor.

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Statement of the case.

On March 19, 1881, J. M. Phipps, being the owner of certain land in the new county of Quitman, executed to the board of supervisors a deed to a part of the same, upon which was to be located the county site. The deed recited that the board had, by resolution, agreed to locate the county site on said land; that ten acres had been set apart by the grantor, which was to be divided into lots according to a plan thereafter to be adopted by the board, said lots to be numbered. In consideration of the premises, and the payment of $10, the said Phipps, by said deed, conveyed to the board one acre of said ten acres, upon which was to be located the court-house and jail, and he also conveyed to the board the even-numbered lots, into which the other nine acres were to be divided, stipulating that he was to retain the odd-numbered lots, and that the parties were to sell their respective lots at the same price. It was also stipulated in said deed that the lots reserved by Phipps, until sold or built upon, should be exempt from county taxes. The court-house and jail were erected on the land which was conveyed for that purpose, and the remainder of the land was divided into lots according to the stipulations of the deed. Said lots then constituted a part of the town of Belen. Afterwards, the board of supervisors filed the bill in this case against the appellees, setting out the above facts, and averring that the defendants claimed title to the land conveyed to it.

The bill also alleged that the board intended and desired to use all of the land conveyed to it, except the one acre upon which the court-house and jail were erected, for the purpose of establishing thereon a county poor-house, or that it would be exchanged for other land upon which to build a poor-house. The prayer of the bill was that the claim of defendants should be canceled as a cloud upon the title of complainant, and for a writ of possession as to said land except the one acre. To this bill defendants filed a general demurrer, which was sustained, and the bill dismissed. But, on appeal, this court reversed the decree and overruled the

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Opinion of the court.

demurrer. Without deciding upon the effect of the deed in so far as it purported to convey the lots to the county, this court held that, as the demurrer was a general one to the entire bill, and as the bill certainly showed a right to relief in respect to the land upon which the court-house and jail were located, the demurrer should be overruled. The case being remanded, complainant filed an amended bill, setting up with more accuracy the facts above stated.

Defendants answered, disclaiming title as to the one acre, and interposed a demurrer to the bill in so far as it related to the lots, the ground of the demurrer being that the county had no power to acquire or own such lots. A decree was entered in accordance with the prayer of the bill as to the one acre, and, as to the remainder of the land, the demurrer was sustained, and the bill dismissed. Complainant appeals.

In this court, counsel argued only the question as to the power of the county to acquire and own the lots. As the court pretermits consideration of this question, deciding that the state only can object, the argument of counsel is omitted.

T. J. Williams, for appellant.

St. John Waddell, for appellees.

COOPER, J., delivered the opinion of the court.

When this case was in this court on a former appeal, we threw out an intimation that the appellees had no concern with the power of the board of supervisors to hold the lands in controversy, but that the state alone could question its right so to do. But it was unnecessary for the disposition of that appeal to decide that question, and it was left undetermined.

Notwithstanding our suggestion on the former appeal, the case seems to have been argued and decided in the court below without reference to the point which lies at the threshold of the investigation; no allusion to it is made by counsel

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Opinion of the court.

upon either side. It is, however, decisive of the whole controversy.

The power to acquire, hold and dispose of real estate is incident to corporations generally, and may be said to be universal, except when either expressly forbidden by the act creating the corporation or by necessary implication springing from the character of the corporation itself. But boards of supervisors may, by law, acquire real estate for certain purposes, and, having such capacity, conveyances to them are not void, but voidable only—the sovereign alone can object. 4 Am. & Eng. Enc. L., 233.

By the conveyance from Phipps, the title to the land passed to the board of supervisors of Quitman county, and neither he nor the defendants, who claim derivatively from him, have any interest in the question whether this body shall be permitted to own and possess or sell the same. That is a matter between the board and the state, in which strangers have no right to be heard. *Grant* v. *Coal Co.*, 80 Pa. St., 208; *Leasure* v. *Insurance Co.*, 91 Pa. St., 491; *Mallett* v. *Simpson*, 94 N. C., 37; *Cowell* v. *Springs Co.*, 100 U. S., 55; *Jones* v. *Habersham*, 107 U. S., 174; *Christian Union* v. *Yount*, 101 U. S., 352; *Hough* v. *Cook Co. Land Co.*, 73 Ill., 23.

The complainant is entitled to the relief prayed.

The decree is reversed and cause remanded.

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Statement of the case.

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DEWITT C. MARTIN ET AL. v. H. S. GILLEYLEN ET AL.

LIMITATION. *Partition. Bill of review. Code* 1880, §§ 2568, 2681, 2693.

Section 2693, code 1880, denying any action to recover property sold under a chancery decree, after two years from date of possession taken by the purchaser, will not debar a minor interested in lands sold in partition proceeding from filing a bill of review at any time within two years after coming of age. Code 1880, §§ 2568, 2681. Partition proceedings are governed by an independent chapter of the code, to which the general provision in said § 2693 has no application.

FROM the chancery court of Monroe county.

WILEY H. CLIFTON, ESQ., a member of the bar, presided as special chancellor by agreement of the parties. HON. BAXTER MCFARLAND, chancellor, having been of counsel, was disqualified.

On September 12, 1882, under a decree in a partition proceeding in the chancery court of Monroe county, certain land, in which the appellants were tenants in common, was sold for a division of proceeds. The sale was reported to the court, and approved March 12, 1883. At the sale the appellee, H. S. Gilleylen, who was complainant in the partition suit, purchased the land. On August 27, 1890, the bill in this case was filed by appellants to review the proceedings and decree in said partition suit. One of the complainants had just come of age, and the other was still a minor at the time of filing the bill of review. They alleged various errors in said original proceedings. A demurrer to the bill was overruled, and the defendants answered, setting up, among other things, the statute of limitations of two years, under § 2693, code 1880. Afterwards, by agreement, the cause was submitted for trial, in vacation, on pleadings and evidence before W. H. Clifton, Esq., a member of the bar, who was selected as special chancellor, the Hon. Baxter McFarland, chancellor, being disqualified, having been of counsel. After

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Brief for appellants.

the cause had been argued, and before decree, the solicitors for complainant made a motion to remand it to rules, in order to take further testimony, and, in support of this motion, filed affidavits setting out certain newly-discovered evidence alleged to be important. The special chancellor overruled this motion, reciting in the order that he was of opinion that complainants were barred by the statute of limitations of two years, above mentioned, and for this cause alone the motion was overruled. Thereupon a final decree was rendered dismissing the bill and taxing complainants with costs, from which this appeal was taken. The record shows that one of the appellants was summoned by publication in the original proceedings.

E. H. Bristow and *Mayes & Harris*, for appellants,

Each filed a brief, in the main relying upon the same authorities, as to the question decided by the court making the following points:

1. Section 2693, code 1880, refers alone to original proceedings, and is not applicable to this case. Section 2681 applies. This, being a bill of review, is not an original proceeding, but is a continuation of the old cause. Story's Eq. Pl., § 403; 2 Daniell's Ch. Pl. & Pr., p. 626; *McLemore* v. *Railroad Co.*, 58 Miss., 514; *Vaughn* v. *Hudson*, 59 *Ib.*, 421.

In all cases where § 2693 of the code has been applied, the action was original. See 52 Miss., 118; 53 *Ib.*, 665; 54 *Ib.*, 289; 56 *Ib.*, 10; 61 *Ib.*, 504; 65 *Ib.*, 288; 66 *Ib.*, 399.

There are four sections of the code of 1880 to be considered, namely, §§ 2681, 2682, 2693, 1955. These must be construed *in pari materia* as one statute to carry out the intent of the legislature. 6 Ind., 354; 10 Ohio, 173; 14 B. Mon. (Ky.), 266; 20 Texas, 355; 14 La. Ann., 113; 30 Cal., 427; Sedgwick on Stat. Con., 209, 212.

Our construction does not make § 1955 an exception to § 2693, and we submit that it is consonant with the policy of courts of chancery in making decrees affecting the rights of

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infants, and with our legislation in saving their rights for a short period after majority.

Gilleylen & Leftwich, for appellees.

Appellants are barred by § 2693, code 1880, which cures all defects before or after the decree, unless suit be brought within the time limited. *Morgan* v. *Hazlehurst Lodge*, 53 Miss., 665.

This is in accordance with decisions in other states having similar statutes. 9 Cush. (Mass.), 223; 13 Ind., 105; 13 Wis., 245; 28 Iowa, 188.

The statute applies, though the court was without authority to appoint the guardian who made a sale (54 Miss., 289; 61 *Ib.*, 504); and so, where the defendant had no notice (56 *Ib.*, 10); and where the sale is made in disregard of the constitution (66 *Ib.*, 399).

The case comes clearly within the provisions of § 2693. The purchase-money was paid in good faith, and possession of the property taken by the purchaser. The case illustrates the beneficial character of the statute. Defendant had been in possession for years, and had made valuable improvements.

There is no authority for the proposition that § 1955, code 1880, is applicable.

The case of *McLemore* v. *Railroad Co.*, 58 Miss., 514, was decided on facts existing prior to the statute on this point. See *Morton* v. *Carroll*, 68 Miss., 699.

While the case was held to be barred by § 2693 of the code, yet we submit with confidence that, apart from this, the decree is correct.

WOODS, J., delivered the opinion of the court.

Bills for partition, at common law, were of infrequent occurrence, and applicable only in a solitary case—in proceedings for division of lands held in coparcenary. Under our laws, partition of lands held by joint-tenants, tenants in common and coparceners having an estate in possession,

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and not in reversion or remainder, whether the joint interest be in the freehold or in a term of years not less than five, may be made by a decree of the chancery court. Adults, minors and persons *non compotes mentis* may all be parties complainants or respondents, and the title as well as right of possession may be adjudicated and finally determined between them in the partition proceedings. It has become a favored method in our system of jurisprudence of conveying and fixing title in the endless and constantly recurring instances of landed estates held in common. Vast proportions of the real estate in our borders are held under titles declared in partition proceedings. The design of our legislation has been to enlarge the scope of the operation, and amplify and simplify the means of the application, and to dignify and make effective the results attained in all partition proceedings. The subject is segregated from and lifted out of our general act in relation to chancery courts, chapter 59, code 1880, and is given an independent and distinct position in chapter 71. The proceeding has its own separate and clearly-defined rules and regulations, apart from and disconnected with the general chancery law of the state. From first to last, from the filing of the bill to the recordation of the final decree, we shall find a complete system of procedure, and to this we must turn for the proper determination of the controlling question presented in the present appeal. And that question goes to the action of the learned special chancellor in dismissing complainants' bill of review, because—as is stated in another ruling below, contained in the record — of the bar to a recovery supposed to be found in § 2693, which declares that no action shall be brought to recover any property hereafter sold by order of a chancery court, where the sale is in good faith, and the purchase-money paid, unless brought within two years after possession taken by the purchaser under such sale of such property. This is part of the general law of the limitation of actions, and is not of force in partition proceedings.

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Opinion of the court.

In § 2568, code 1880, will be found the independent, separate and controlling law applicable in the case at bar—a law fixing and determining the force and effect of final decrees in partition proceedings, and binding alike on all parties, adults, minors and persons of unsound mind, and providing the only limitation upon its operation. "The final decree of the chancery court in such case shall ascertain and settle the rights of the parties, and shall constitute an instrument of evidence in all questions as to the title of the lands, which may be the subject of such decree, in all courts, and shall be conclusive as to the rights of all parties to such suit, subject to the provisions of this act, and subject to appeals and bills of review, as in other suits in the chancery court." The decree complained of is conclusive, subject to appeal and bill of review, as in other suits in the chancery court.

One of the complainants is yet a minor, and the other has only just attained her majority. They have not appealed from the original decree, but have filed their bill of review within the time prescribed by the general law for taking bills of review in the chancery courts. Under the general law, § 2681, code 1880, the law applicable to other suits in the chancery court, "bills of review in chancery shall be filed within two years next after the date of the final decree in the cause, and not after; saving to persons under any disability, as hereinbefore mentioned [§ 2677], the like period of two years after the removal of such disability."

The appellants were entitled to an ordinary bill of review, and the action of the court in dismissing their bill outright was erroneous. They should be required to restrict their demand for relief to such as may be afforded them under the ordinary bill of review in chancery. One of the complainants is still a minor, and the other has just reached her majority, and the court, as the guardian of the minor's interests, should have treated the bill as the ordinary one for review, and heard and determined the case in that aspect of the rights of the parties. Though mistaken as to the precise

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Statement of the case.

character of the bill proper to be exhibited, and as to the measure of their rights, they should not have been bundled out of court neck and heels.

Reversed, and remanded for further proceedings in accordance with this opinion.

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KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY v. A. C. CANTRELL.

1. VERDICT. *Supported by evidence. When not set aside.*

If a verdict is supported by evidence, and the court cannot say the jury was unwarranted in reaching a conclusion, it will not be disturbed, although a finding for the opposite party would have been more satisfactory to the court.

2. PRACTICE. *Usee in action ex delicto. Irregularity.*

An action of damages against a railroad company for killing animals on its track, being *ex delicto*, should not be brought in the name of one for the use of another. And in an action so brought a recovery against the defendant will not be disturbed for want of proof that the usee had an interest in the suit. His connection with the case will be disregarded in passing upon the correctness of the verdict.

FROM the circuit court of Monroe county.

HON. LOCK E. HOUSTON, Judge.

Action of damages against appellant, by A. C. Cantrell, for the use of D. E. Cantrell, for the value of a mare alleged to have been killed on defendant's track, by the negligence of its employes.

Defendant prevailed, but, on appeal, the judgment was reversed and the cause remanded for a new trial. See *Cantrell v. Railroad Co.*, 69 Miss., 435. On another trial, plaintiff recovered judgment. The case originated in the justice court, and, consequently, there were no pleadings in writing. The bill of particulars, or statement of account on file, was made

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Brief for appellant.

out in the name of A. C. Cantrell alone, but the style of the case on the docket was "A. C. Cantrell, use of D. E. Cantrell," against the defendant. The judgment was, "that plaintiff have and recover of the defendant," etc. The testimony showed that the animal killed was the property of A. C. Cantrell. There was nothing in the evidence to show that D. E. Cantrell had any interest in the subject-matter, or any connection with the suit. There was no proof that the claim had been assigned to him.

The evidence was conflicting as to the alleged negligence of the defendant.

The defendant asked the court to give a peremptory instruction in its favor, because there was no evidence showing that D. E. Cantrel had any interest in the suit, which instruction was refused. It was also one of the grounds assigned in a motion for a new trial, that D. E. Cantrell had no interest.

Motion for new trial overruled. Defendant appeals. The opinion contains a further statement of the case.

J. W. Buchanan, for appellant.

There is nothing to show that D. E. Cantrell had any interest in the subject-matter of this suit. In *Beck* v. *Rosser*, 68 Miss., 72, it was held that D. E. Rosser could not bring suit for the use of John Rosser against the defendant, for the reason that the account on which the suit was based had been assigned in writing to John Rosser.

Under § 1516, code 1880, it is clear that D. E. Cantrell was the owner of the claim; A. C. Cantrell was only the nominal plaintiff. If the claim, as shown by the proof, belonged to A. C. Cantrell, then we insist that the suit cannot be maintained in his name for the use of D. E. Cantrell.

However technical this may be, and no matter how trivial in the view of common sense, it is, nevertheless, the law, and we insist upon it. The court should have either instructed for the defendant or should have set aside the verdict.

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Opinion of the court.

(Counsel also discussed the evidence, but, in view of the opinion, it is not necessary to give this part of the argument.)

Clifton & Eckford, for appellee.

The only question presented is purely technical. Even if the assignment had been in writing, the suit was properly in the name of A. C. Cantrell. Trespass can be maintained by him who had title at the time of injury. 13 Smed. & M., 591; 26 Miss., 335; 67 *Ib.*, 497.

The bill of particulars is in the name of A. C. Cantrell alone. How the name of D. E. Cantrell got into the record as usee does not appear, and it is doubtful if he is a party even as usee. 28 Miss., 246.

The assignment was not in writing, and the suit could be maintained with or without the addition of the name of the usee. *Lee* v. *Gardiner*, 26 Miss., 521; *Pearce* v. *Twichell*, 41 *Ib.*, 344.

It was unnecessary for plaintiff to prove assignment. If defendant desired to show that A. C. Cantrell did not have the legal title, it could have been done under the plea of not guilty. *Lake* v. *Hastings*, 24 Miss., 490.

COOPER, J., delivered the opinion of the court.

While the verdict on the facts in evidence in this cause for the defendant would have been more satisfactory to us, we cannot say that the finding in favor of the plaintiff is not supported by the evidence. There is conflict in the testimony in reference to the distance the animal ran in front of the train before it was overtaken and killed, and though we think it probable the train could not have been stopped in time to prevent the injury, even if the evidence of the plaintiff's witnesses is accepted as fixing the distance the animal ran after getting on the road-bed, we cannot say that the jury was not warranted in reaching a different conclusion. Under such circumstances, the trial court rightly refused to give the peremptory instruction asked by the defendant.

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Syllabus.

The point principally pressed by counsel for appellant is that the verdict should have been for the defendant, for the reason that the action is brought by A. C. Cantrell—the owner of the animal killed—for the use of D. E. Cantrell, and that there is an absence of any evidence tending to show that the usee had or has any interest in the claim sued on. It is settled that actions of this character are, in their nature, *ex delicto*. *Miss. C. R. R. Co.* v. *Fort*, 44 Miss., 423; *R. R. Co.* v. *Andrews*, 61 *Ib.*, 474.

In actions of tort there cannot be a usee, and, if one is named, his rights must be disregarded, and the plaintiff will fail of recovery unless the right of the nominal plaintiff be proved. This rule has been applied by this court in various classes of actions: In trespass (*Brown* v. *Thomas*, 26 Miss., 335; *Lacoste* v. *Pipkin*, 13 Smed. & M., 589); in detinue *Hundley* v. *Buckner*, 6 Smed. & M., 70); and in replevin (*Pearce* v. *Twichell*, 41 Miss., 344; *Meyer* v. *Mosler*, 64 *Ib.*, 610).

The judgment is affirmed.

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ILLINOIS CENTRAL RAILROAD CO. v. P. F. CATHEY, ADM'R.

1. RAILROADS. *Liability to employe prior to constitution* 1890. *Negligence.*

In an action against a railroad company, where it is shown that injury was caused to an employe by the negligence of defendant, prior to the constitution of 1890, the law then in force governs. By it, the defendant is *prima facie* not liable to the employe for injury suffered in the service for which he was employed.

2. SAME. *Negligence. Connection with injury.*

The gist of such an action is negligence of the defendant, and that injury to the employe resulted therefrom. It is not sufficient merely to show negligence of the employer, and a possibility that the injury complained of was caused thereby.

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Statement of the case.

3. VERDICT. *Unsupported by evidence. Duty to vacate.*

In such case, while maintaining inviolate the right of trial by jury, and adhering to the rule that a verdict will not be disturbed merely because the court differs from the jury in considering the evidence, yet, if after a careful consideration of the evidence for plaintiff, giving it all full credit, the court cannot discover any probable connection between the defendant's negligence and the injury suffered, a verdict for plaintiff will be set aside.

4. PRACTICE. *Variance. Failure to object. Waiver.*

Where there was a variance between the declaration and the evidence, no objection being made on that ground, and an amendment would have been allowable, so as to conform the pleadings to the evidence, after verdict for plaintiff, the defendant, on appeal, will be held to have waived the objection, though the variance would have been fatal on timely objection.

FROM the circuit court of Lafayette county.

HON. JAMES T. FANT, Judge.

Action of damages by P. F. Cathey, administrator of the estate of his deceased minor son, J. W. Cathey, against the Illinois Central Railroad Company. The declaration alleges that the "said defendant, while operating its freight-cars by the powerful and dangerous agency of steam, within the limits of the city of Canton, Mississippi, a city duly incorporated, wilfully and recklessly, with gross and wanton negligence, ran its cars over and killed said J. W. Cathey." There was no other allegation as to negligence.

The material facts, as shown by the testimony, are as follows: Young Cathey was a minor. He was employed by the defendant, and his duties were those of night switchman in the Canton yard, with which he was familiar. He helped to make up the trains there. About the twentieth of May, 1890, at night, a freight-train was being made up in the yard. Cathey was directed to make the coupling of a coal-car. This he did; but, in doing so, he either fell or was knocked down and injured. The wheels passed over his right leg and left foot. From the injuries received, he died the next morning. No one was near enough to be able

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to say just how the accident occurred or what caused it. Some of the witnesses testified to having seen him fall, and others heard him cry out; the lantern he had in his hand was seen to go up and then fall suddenly. When he was reached he was lying on his back, with his body outside the track and his legs under the car. He stated to the attending physician that "he fell down between the cars." The injury occurred on a switch or side-track, and plaintiff introduced evidence of various defects about the track, namely: That the rails where the deceased fell were laminated so that iron splinters stuck out from them the size and length of a man's finger, and strong enough to trip a man; that the ties were rotten, and that there was a depression in the track, which caused it to give way several inches as the train passed over; that there were lumps of coal scattered about on the ground between the rails, some of them "as large as a man's two fists," and over which one would be likely to stumble. There was also testimony tending to show there were blood spots near the rail; and it was shown that the left leg of the pants which deceased had on was freshly snagged and torn near the bottom, and on the inside of, and parallel with, the rail at this point there was a man's track. It was shown that one always goes in sidewise to couple cars. There was also evidence tending to show that, before the injury, the attention of the yard-master and road-master of defendant had been called to the defective and dangerous condition of the track at that place. After the injury, the rail at the place where deceased was run over was taken up and replaced with another. The rail which was taken up was not produced at the trial. There were some conflicts in the testimony; but, in view of the opinion of the court, it is not deemed necessary to specify the same, or to set out the evidence more fully.

Plaintiff's second instruction, alluded to in the opinion, is as follows:

"The court charges the jury that, if they believe from the

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Brief for appellant.

evidence that the road-bed and rail of defendant company at the point of injury was dangerous, and out of repair, and the railroad company was guilty of gross negligence in permitting its road-bed, rails and track to be out of repair, and that the condition of the rails was dangerous at the point of injury, and that these facts were brought to the notice of the railroad company before the accident, and that the company failed to repair its rails and road-bed, and that the death of Cathey was the result of such gross negligence of the company in not repairing its rail and track, and that Cathey was not guilty of contributory negligence, then the jury should find for the plaintiff, and assess his damages at such amount as they may believe from the evidence he is entitled to."

The jury found a verdict in favor of plaintiff for $9,000, and judgment was entered thereon. Motion for new trial overruled. Defendant appeals. The opinion contains a further statement of the case.

Mayes & Harris, for appellant,

1. Discussed the facts at length, contending that there was no proof that the injury complained of was caused by defendant's negligence; that the theory of the deceased being injured by reason of the causes alluded to in the evidence, was based upon pure conjecture, and that, as there was no proof of a causal relation between the injury and the alleged negligence, the verdict was wholly unsupported, and there should have been a peremptory instruction to find for the defendant, citing *Short* v. *Railroad Co.*, 69 Miss., 848.

2. Granting, for the purpose of argument, that the deceased was killed by reason of defendant's negligence in respect to the things mentioned in the testimony, still it was a proper cause for a peremptory instruction. It was the duty of the yard-master and section-boss to keep the track in order, and these parties were fellow-servants with the deceased. *Lagrone* v. *Railroad Co.*, 67 Miss., 592. The acci-

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Brief for appellee.

dent occurred in May, 1890, hence, the provisions of the new constitution as to this have no application.

3. Plaintiff's second instruction should not have been given. It lays down a rule of recovery which is at variance with the pleadings. The declaration puts the case on wilful and wanton negligence in running cars, while the evidence and this instruction put it wholly on a different ground—that is, in not keeping the track in order. On this point, see authorities referred to in George's Miss. Dig., p. 423, § 54. The instruction is also erroneous in charging that, if the jury found for plaintiff, they "might assess his damages at such amount as they may believe from the evidence he is entitled to." The court should have fixed the elements of damages to be considered. This was not an action under § 1510 of the code, for the death of the deceased; and his death is not an element in the computation. *Railroad Co.* v. *Phillips*, 64 Miss., 693.

A. H. Whitfield, for appellee,

Filed a lengthy brief, contending substantially as follows:

1. The conclusion reached by the jury, and properly, from the evidence, was that Cathey went in sidewise to make the coupling, and made it, turned, was caught by the spurs, and fell, and, in falling, threw himself backwards on the ground; that the spurs caught the left leg of his pants near the bottom, and, holding, threw him; or, else, that he stumbled over coal shown to have been there. The first proposition is the more probable one, and it is manifestly what occurred. Is it possible that the finding of the jury on this pure, unmixed question of fact is to be disturbed by the court?

2. The case is entirely different from *Short* v. *Railroad Co.*, 69 Miss. There it was shown that the track was in good condition; here the track was out of repair, and dangerous in the extreme. Counsel's whole argument means that "causal relation" can never be made out by circumstantial evidence.

3. It is an astounding proposition that this case is governed

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by the decision in *Lagrone* v. *Railroad Co.*, 67 Miss., 592. This is a case of defective machinery and defective road-bed, and is within the exception of the fellow-servant doctrine.

4. The objection to the second instruction is hardly serious. There is no countenance for the proposition that the damages claimed were for the death and punitory.

5. Other cases decided by this court hold that the company is liable in a case like this, where the track is unsafe and the rails and cross-ties worn out. It was so held in *Hughes' Case*, and in the case of *McMaster* v. *Railroad Co.*, 65 Miss., 264. And in the recent unreported case of the *I. C. R. R. Co.* v. *Ruffin*, the fellow-servant doctrine was held no defense. As to the fellow-servant doctrine, I refer the court to the accurate language of Judge Dillon, in 24 Am. L. Review, p. 190, quoted in 11 Lawyers' An. Rep., 76.

The true inquiry is, was the accident one of a normal and natural risk in the ordinary course of business? If the railroad company will have an unsafe track, splintered and worn out rails and cross-ties, it is most emphatically not a normal or natural risk.

CAMPBELL, C. J., delivered the opinion of the court.

The recovery in this case was for an injury suffered before the constitution of 1890, and the law then in force governs. By it, the defendant *prima facie* was not liable to its employe for an injury suffered in the service for which he was employed. The gist of the action is negligence of the employer, by failure in duty to the employe, and that the injury resulted from this negligence. It is not enough that negligence of the employer and injury to the employe co-existed, but the injury must have been *caused by* the negligence; and the fact that injury to an employe occurred after the negligence is not sufficient to show the relation of cause and effect between them. *Post hoc ergo propter hoc* is not sound as evidence or argument. Nor is it sufficient for a plaintiff, seeking recovery for alleged negligence by an employer towards an em-

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ployé, to show a possibility that the injury complained of was caused by negligence. Possibilities will not sustain a verdict. It must have a better foundation.

There was a fatal variance between the declaration and the evidence in this case, but no objection was made on that ground, and, as an amendment would have been allowable so as to conform the pleading to the evidence, if this objection had been made, it must be held to have been waived, and cannot be made available here now.

The second instruction for the plaintiff is subject to the criticism that its mention of the *death* of Cathey, as a result of the accident, may have caused the jury to suppose that the death was an element of damage to be estimated by it. But this might not cause a reversal in a case where the evidence showed satisfactorily the right of the plaintiff to recover. Such is not the state of this case. The evidence of the plaintiff is wholly insufficient to establish any necessary or even probable connection between the negligence of the defendant, testified of by the witnesses for the plaintiff, and the hurt of Cathey. He may have suffered his injury as the result of the things spoken of, but no man can say that he did, or that it is probable he did. His business was a perilous one, in which the most experienced and cautious are liable, under the most favorable conditions, to suffer injury, and meet death, which lurks in a thousand forms, and claims its victims when least expected oftentimes. It is just as probable, from the evidence, that Cathey fell from some one of the many causes that might have caused it, as that he stumbled over the coal or uneven rails or from his pants being caught on a piece of the rail, which was said to project from it at right-angles, which latter is said by counsel to have been the most probable cause of his fall. All is pure guessing, the merest conjecture, as to how the accident was produced, and the evidence for the plaintiff fails to do more than to suggest several ways in which it might have occurred; but what caused it is unknown, ex-

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cept as indicated by what the unfortunate young man said—*i. e.*, "He fell down between the cars, and the wheels passed over" him. That much is known, and no more can be affirmed, with confidence, as a fact, or as a reasonable probability from human experience in tracing consequence to cause by the light of the evidence produced by plaintiff, on which we have considered the case, without regard to the testimony for the defendant, which, if believed, completely disproves the case made by the plaintiff's witnesses. They differ among themselves materially, and one might well hesitate to conclude that the truth is discoverable from their testimony as to where the sad mishap took place, and whether precisely at that point there was either coal or splinters from the rail, or depression or unevenness of track, or any other defect, on which to lay the blame of the deplorable misfortune of young Cathey on that fatal night, when, in the performance of duty in the perilous service in which he was engaged, he received a mortal hurt. But we have considered the case as if all was proved which the plaintiff's evidence, accepted as true, tends to prove, and, thus viewed, there is a wide chasm between the matters referred to as the cause of the hurt and the injury received. This chasm has no bridge but conjecture, which is insufficient to maintain a jury in crossing to a verdict in any case. It must, therefore, have been *leaped* by the jury, moved by sympathy for the dead son and the living, sorrowing father, and incited by the eloquence of counsel dealing with so pathetic a theme. We maintain inviolate the right of trial by jury, and scrupulously preserve the line that marks the distinction between the functions of court and jury, and adhere to the rule that where the verdict is supported by evidence sufficient to maintain it, it should not be disturbed by the appellate court because it takes a different view of the evidence from that held by the jury, and would have given a different verdict, but where, as in this case, after the most careful consideration by us of all the evidence for the plaintiff, giving it all

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full credit, we cannot discover any probable connection between the negligence narrated and the injury suffered by Cathey, our duty is to set aside the verdict, which is accordingly done.

Reversed and remanded.

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MARY CRAWLEY *v.* RICHMOND & DANVILLE RAILROAD CO.

RAILROADS. *Excessive speed. Injury. Contributory negligence.*

Although a railroad company is *per se* guilty of negligence, and also violates the law in running its train within an incorporated town more than six miles an hour, recovery cannot be had of it for the death of one whose contributory negligence, in recklessly exposing himself before the train while so running, was unmistakably the efficient cause of his being struck by the engine and killed.

FROM the circuit court of Webster county.

HON. C. H. CAMPBELL, Judge.

In May, 1891, Mike Crawley, a young unmarried man, was struck and killed by a locomotive attached to one of appellee's passenger-trains, and this action was instituted by Mary Crawley, his mother, to recover for the loss of his services. It is not controverted that plaintiff, as sole parent, dependent for a support upon the deceased, was entitled to recover if the accident occurred through the negligence of the railroad company, and without contributory negligence on the part of the deceased. The defense rests solely on the ground that Mike Crawley was guilty of contributory negligence, directly causing his own death. The uncontroverted evidence is that Mike Crawley was in Eupora, a station on defendant's railroad in Webster county, and intended to take passage on the passenger-train going west; and when the train whistled for the station he was near a beer saloon,

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about two hundred and fifty feet from the station-house. He had purchased a bottle or two of beer, and, when he heard the whistle of the locomotive, he ran into the saloon and hurriedly purchased two more bottles of beer, and ran to the depot, intending to purchase a ticket and take passage on the train. The track runs east and west, and the station-house is on the north side of the track, and south-east of the beer saloon. The ticket-office and waiting-room for passengers was, at that time, in the west end of the station-house; the freight department being in the east end. The platform in front of the ticket-office and along the west side of the station-house was very narrow, and not more than six or seven inches high. It did not extend entirely to the east end of the house, but terminated about six feet from the end, where it sloped to the ground, and to some planks lying on the ground, which extended to the iron rails of the track. As Crawley reached the depot, and ran around the south-east corner, he was only eight or ten feet in front of the west-bound passenger-train, which was, at that moment, running at the rate of twelve or fifteen miles an hour. A by-stander called to him to "look out," and he stopped suddenly and turned around, when he was struck by the projecting pilot-beam of the locomotive and knocked down. His body was caught by the small wheels of the tender and dragged some distance, and, when the train was stopped, he was removed from under the tender badly mangled, and in a dying condition.

There was a sharp conflict in the evidence as to the point at which Crawley was standing when struck. Several witnesses for the plaintiff testified that he had just stepped upon the second plank of the platform which was used by passengers; that the pilot-beam projected over the edge of the platform, so as to render it dangerous for passengers standing near the edge. On the other hand, witnesses for the defendant testified that Crawley ran so rapidly around the corner of the station-house that his momentum carried him

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to, or very near, the rails, and that he either fell or was struck by the engine. Several witnesses who were in front of the beer saloon testified to this, and further stated that they saw Crawley when he was struck, and that he was not on the platform, and that it was impossible to see the platform, or one on it, from the direction of the saloon. There were other minor circumstances in evidence tending to support the contention of both sides, but as the court, in its opinion, finds, as a matter of fact, from all the evidence, that the action of the deceased was imprudent and reckless, it is not deemed necessary to set out the evidence in greater detail.

The main question passed on by the court arises out of its consideration, in connection with Crawley's negligence of the negligence and illegal conduct of the railroad company in running its train at an excessive rate of speed. The engineer admitted that, at the time of the accident, the train was running about twelve miles an hour.

Section 1047, code 1880, is as follows: "Any railroad company having the right of way may run locomotives and cars by steam through towns, cities and villages, at the rate of six miles an hour, and no more; and if, in passing through any town, city, or village any locomotive or car should be run at a greater rate of speed, the company shall pay $100 to be recovered by suit in the name of such town, city or village, and for its use; and the company shall, moreover be liable for any damage or injury which may be sustained by any one from such locomotive or cars whilst they are running at a greater rate of speed than six miles an hour through any city, town or village."

The trial in the circuit court resulted in a peremptory instruction for the defendant. Judgment accordingly, and plaintiff appeals.

Rush & Gardner, for appellant.

It cannot be said, under the evidence, that there is no room

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to doubt that plaintiff was guilty of contributory negligence. In such case it is error to give a peremptory instruction. 52 Miss., 704. Disinterested witnesses testify that deceased was standing on the platform when struck. Being there, he had a right to assume that he was safe from collision. Surely it is not *per se* negligence to be on a passenger platform when a passenger-train is passing. It is the duty of the railroad company to provide safe platforms, and one on any part of the platform may suppose he is safe from collision with passing trains, just as pedestrians on a sidewalk, who are not on the watch for passing vehicles, are not *per se* guilty of negligence. See 72 Mo., 392; 8 Am. & Eng. R. R. Cas., 485. The railroad company must run its engines with reference to such use of its platforms. Pierce on Railroads, 276; Whittaker's Smith on Neg., 318; 1 Thompson on Neg., 315. The use of a platform that is too narrow is itself gross negligence in the company. 63 Ill., 167. Railroad companies are liable for the injuries where passengers on platforms at stations are struck by passing engines, any part of which projects over the platform. Patterson on Ry. Ac. Law, 256; 88 N. Y., 203; 72 Mo., 392. But for the excessive and illegal rate of speed, deceased would not have been killed. This is a stronger case than *Fulmer* v. *R. R. Co.*, 68 Miss., 355.

A. F. Fox, for appellee,

Filed a written argument, without citation of authorities, to show that deceased was guilty of the grossest contributory negligence.

Argued orally by *W. T. Rush*, for appellant, and *A. F. Fox*, for appellee.

CAMPBELL, C. J., delivered the opinion of the court.

It is so clear that the unfortunate man who was killed contributed directly to his own death by his incautious and reckless action, that the court properly told the jury the plaintiff was not entitled to recover.

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Brief for appellant.

It is true that the defendant was guilty of a violation of law in the rate of speed at which the train was run, but this was *causa sine qua non*, while the *causa causans* was the imprudence of the person killed, so unmistakablé as to authorize the assertion that he was the cause of his death.

We sympathize tenderly with the mother, who, in the death of her son, lost her means of support, but have no authority to serve her by permitting any relaxation of the rules of law in her favor.

Affirmed.

ILLINOIS CENTRAL RAILROAD CO. v. ELIAS SMITH.

EXEMPT WAGES. *Foreign garnishment. Conflict of laws.*

The exemption under our statutes of a debt due a laborer, who is a citizen of this state, for work done here, cannot be defeated by garnishing the debtor, a railroad company, in another state, it having a line of railroad there, as well as in this state. Both debtor and creditor residing here, the court will give effect to our exemption laws, regardless of the laws of such other state.

FROM the circuit court of Pike county.

HON. W. P. CASSEDY, Judge.

The opinion sufficiently states the facts.

S. E. Packwood, for appellant.

The suit in Iowa having been first commenced, and having jurisdiction, takes precedence. The exemption laws do not concern us in this case. Appellant is sued as garnishee of plaintiff in another pending suit, and that suit should have the same effect as if pending here. Our courts will give the statute of Iowa the same effect as it has in that state. 7 Cranch, 481; 3 Wheat., 234; 17 Wall., 521.

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Opinion of the court.

Mayes & Harris, on the same side.

The pendency of a foreign attachment and garnishment is a good plea in abatement in a case like this. The defendant is not attempting to evade any exemption laws, nor to withhold any debt from its employe. It should not be made to suffer by paying twice.

Price & Sternberger, for appellee.

Our courts will not lend themselves to an interstate debt-collecting scheme, such as is here disclosed, to evade our exemption laws. The wages are payable here, and the *situs* of the debt must govern. Story on Conf. Laws, 549; 8 Am. & Eng. Enc. L., 1254; 3 *Ib.*, 523; Drake on Attach., §§ 478, 480.

WOODS, J., delivered the opinion of the court.

The appellee is a mechanic, the head of a family and a resident in this state. He is employed as such mechanic by appellant, in its shops at McComb City, in this state. The debt sued for is wages due from appellant to appellee under such employment. By the terms of the contract, made at said McComb City, the wages sued for were payable at that place, and amount to less than one hundred dollars. Under our law, these wages are exempt from garnishment or other legal process. The appellant is a corporation, doing business and resident in this state. We have, then, both creditor and debtor residents of this state; the sum sued for due under a contract made in this state, by the terms of which the wages are to be paid in the state; the creditor is a mechanic, the head of a family and entitled to the exemption of wages, to an amount not exceeding one hundred dollars, from garnishment or other legal process.

In bar of a recovery, or in abatement of this suit, appellant pleaded that it had been summoned in a court in the state of Iowa in an attachment-suit, began there against the appellee by one A. M. Dunkel, and had made answer, showing an in-

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debtedness due appellee of $15, and that said suit in Iow
was yet pending and undetermined.

From the brief of the very candid and able counsel fo
appellant, we are led to believe that this is a collusive attac
ment-suit in Iowa, and that some Mississippi creditor, wh
cannot make the money due by Smith, the appellee, in ou
courts, because of our exemption laws, is really the plainti
in attachment in Iowa. If this appeared in the record, w
could affirm the judgment of the court below without r
mark, as we know of no court which has ever lent any cou
tenance to such collusive effort to defeat the exemption law
of the state of residence of the real creditor and his debto
In the absence of any evidence in the record on this poin
we address ourself to the sufficiency of the plea of appellan
on general principles.

Will attachment lie in a foreign state for the debt sue
for in this action, on the facts hereinbefore stated? There
some real conflict—and much confusion not reaching the pr
portions of actual conflict—in the decisions on the subjec
Much of this confusion, and some of the conflict, has arise
out of a misapprehension of the real nature of the questio
With a clear misapprehension of the character of the co
troversy, several of the courts of last resort in the Unite
States have misled themselves and misled others by inveig
ing against supposed attempts to give extraterritorial effe
to exemption laws. The suggestion that this is the questi
involved is wide of the mark. It is really this questio
Shall the state give its exemption laws intraterritorial forc
in cases like the one at bar? Shall railroad corporation
doing business and resident in this state, be regarded a
treated, in this and like cases, just as natural persons? T
natural person, resident in this state, is not garnishable in
foreign jurisdiction, for a debt due and payable here. Th
is declared, and advisedly, to be settled law in the Unit
States, in *Bush* v. *Nance*, 61 Miss., 237. The appellant is
resident of this state, and the fact that it may also be a co

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poration and resident in other states, may not operate to abrogate our exemption laws, founded in beneficent public policy, in so far as railroad corporations may be affected by them.

Furthermore, it is demonstrably certain that the *situs* of the debt sued for in this action is in Mississippi. The creditor and debtor are both resident here; the contract creating the debt was made here; by its terms, payment is to be made here; the garnishee in the foreign attachment proceeding is resident here. Can it be seriously contended that the courts of this state have not exclusive jurisdiction of the debt, and that the courts of other states are without jurisdiction, and that the sum disclosed by the garnishee, in a foreign attachment, as due in the state of his residence and the residence of his creditor is not liable to condemnation in such proceeding? In this case, the debt is not within the jurisdiction of the foreign court, but here, at the residence of the creditor and place of payment under the contract of its creation. *Louisville, etc., R. R.* v. *Dooley*, 78 Ala., 524; *Nye* v. *Liscomb*, 21 Rich., 263; *Lovejoy* v. *Albee*, 33 Me., 414; *Missouri, etc., R'y* v. *Sharitt*, 43 Kas., 375; *Drake* v. *Lake Shore R. R.*, 69 Mich., 168; *Green* v. *Bank*, 25 Conn., 452; *Sawyer* v. *Thompson*, 24 N. H., 510; *Lawrence* v. *Smith*, 45 N. H., 533; Reno on Non-residents, p. 152 *et seq.*

The numerous decisions which are cited and quoted as authority for the view opposed, beginning with the case of *Embree* v. *Hanna*, 5 Johns., 101, and running down as late as the case of *East Tenn., etc., R. R. Co.* v. *Kennedy*, 83 Ala., 462, will be found, on critical examination, to be, in the main, not in necessary conflict with our view of the true doctrine.

We are not to suppose rashly that the courts of Iowa will proceed to judgment against the appellant, as garnishee in the attachment-suit there pending, on a full presentation of the facts of the case; but, if they shall, it will be another illustration of liability to hardship, now and then, to liti-

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Statement of the case.

gants, growing out of conflict of laws in different jurisdictions. Better this hardship to a corporation having more than one domicile than a rule which would strip all laborers and mechanics in railway employment of the wise provisions of a humane exemption law, and, virtually, largely abrogate our policy and legislation on the subject of exemptions to heads of families in railroad service.

Affirmed.

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LOUISVILLE, NEW ORLEANS & TEXAS RAILWAY CO. *v.* R. F. AND S. TATE.

1. RAILROADS. *Killing stock. Negligence. Case.*

Where, in an action against a railroad company for killing a mule, the engineer, the only witness for defendant, testified that, when first disclosed by the head-light, the mule was standing across the track, about fifty yards ahead of his rapidly moving train, and it was then impossible to avoid the accident, and the evidence for plaintiff is merely that the tracks of the mule showed that it had run forty yards down the track before being struck, there is no real conflict in the evidence, and, that of the engineer being probable, the court should have instructed for the defendant.

2. INSTRUCTION. *Aimed at witness. Uncontradicted testimony.*

Where the testimony of the only witness for defendant is uncontradicted, and not improbable or unreasonable, it is error to give an instruction, at the instance of plaintiff, that if any witness has knowingly testified falsely in a material matter, the jury may disbelieve him.

FROM the circuit court of Tunica county.

HON. R. W. WILLIAMSON, Judge.

Action by appellees to recover of the appellant company the value of a mule killed by its running train. The testimony of the witnesses for the plaintiff is stated in the opinion. It may be added that they testified that the tracks of

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Brief for appellant.

the mule showed that it ran about forty yards down the track before being overtaken.

The engineer, who was the only eye-witness, and the only witness examined for the defense, testified that the night was dark; that his train—a freight, consisting of thirty-five loaded cars—was running twenty-five miles an hour; that he was at his post, and on the lookout; that the mule came on the track at the place where it was killed, and, when first seen, was standing across the track about fifty yards ahead of his engine, and did not move until struck, and that it was impossible to stop or check the train in time to avoid the accident.

The fourth instruction given for plaintiff is as follows:

"If the jury believe from the evidence that a witness has testified falsely to a material fact in one respect, then the jury may disregard his entire evidence, but they are not bound to do so. They may believe him in part and disbelieve him in part, and it is a matter exclusively for the jury to determine whether they believe or disbelieve any witness in whole or in part; but there is a presumption of law that, if a witness has wilfully and knowingly testified falsely in one respect with regard to a material fact, his entire testimony is to be received with great caution."

Verdict and judgment for plaintiff. Motion for new trial overruled, and defendant appeals.

Mayes & Harris, for appellant.

The testimony of the engineer is not contradicted. It is not improbable, and is not inconsistent with the facts testified to by plaintiff. Every thing in evidence for plaintiff may be true, and yet the statement of the engineer may also be true.

The fourth instruction assumes that the engineer testified falsely. He is uncontradicted, and nothing in the evidence warrants the giving of the instruction.

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Calvin Perkins, for appellee.

There was sharp, if not irreconcilable conflict in the evidence, and the question of negligence was for the jury. *Railroad Co.* v. *Cantrell*, 69 Miss., 435; *Kent* v. *Railroad Co.*, 67 *Ib.*, 608.

Argued orally by *J. B. Harris*, for appellant.

CAMPBELL, C. J., delivered the opinion of the court.

Reluctant as we are to set aside a verdict approved by the circuit judge, we are so dissatisfied with this one as to feel constrained to do it. There is no real conflict between the witnesses as to material facts. Doubtless, each told the truth as he understood it, and, if so, the defendant was entitled to a verdict. The plaintiff's witness testified that the numerous tracks indicated that the mule had "fed along" the road-bed for nearly or quite an hour (which must have been the merest guess, for how many tracks a mule grazing would make in a given time must be very uncertain, because depending on so many things), and had run down the track from near a trestle to near where it appeared to have been caught and killed. This may be true in all respects, and it does not follow that the testimony of the engineer is not true. The running of the mule may have been some time before the train came near enough for it to be seen. It may have heard and seen the train in the distance, and run and stopped to gaze, and have been thus engaged when seen by the engineer; or the running may have been quite independent of the train, and the mule may have come onto the road near where it was caught, which is suggested by the testimony for the plaintiff, to the effect that it came on near where it was struck. It is not improbable that it ran, and got off the road, and went on, and was standing across, as stated by the engineer. No one knows how it was except the engineer, and he testifies as above, and he is uncontradicted, and there is nothing improbable or unreasonable in his evidence.

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Statement of the case.

There is nothing in the testimony to warrant the fourth instruction for the plaintiff, which was aimed at the engineer.

In our opinion a new trial should have been granted.

Reversed and remanded.

ANDREW GILCHRIST *v.* L. L. PEARSON.

AGENCY. *As to lands. Contract of sale of personalty. Authority.*

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A non-resident banker having an agent in this state to look after his wild land here, with power to negotiate sales thereof, subject to approval, pay taxes, sue for trespass, and otherwise exercise general supervision as to the land, is not bound by a contract made by such agent, in his name, to buy 60,000 staves, and sell them to another. So held, although the contract grew out of a transaction in which the agent had, by replevin, seized 23,000 of the staves as having been cut on the land of his principal, and which the principal had authorized him to sell.

FROM the circuit court of the second district of Panola county.

HON. EUGENE JOHNSON, Judge.

The record shows that appellant, Andrew Gilchrist, is a non-resident of this state, engaged in banking. He owns a large body of wild land in this state, and is represented here by one F. C. Nelson, who resides at Jackson, Miss., who is his agent to look after said land, and by his attorneys, Nugent & McWillie, who also reside at Jackson, Miss. In 1890 one Ehrman got out about 60,000 staves, some of which he cut, as a trespasser, on the land of Gilchrist. The appellee, Pearson, having purchased the staves gotten out by Ehrman, entered into a written contract with one Leonard, by which he was to sell and deliver to him all the said staves. Shortly after this contract was made, and before it was executed, Nelson, the agent of Gilchrist, in the name of his principal,

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sued out a writ of replevin, and seized 23,000 of the staves as having been cut on the land of Gilchrist, though the evidence shows that only 9,000 of them were so cut. This interfered with the execution of the contract between Pearson and Leonard. Afterwards there were negotiations between Pearson, on the one hand, and Nelson, as agent of Gilchrist, on the other, looking to a settlement of the matters in controversy. It was claimed by Pearson that Nelson on behalf of Gilchrist, agreed by way of compromise, to dismiss the replevin suit, and to purchase from him the 60,000 staves, and carry out the contract for the sale of the same to Leonard. This contract not having been carried out, the 23,000 staves which Gilchrist had seized in the replevin suit, and for which he had given bond, were sold by him, and afterwards Pearson brought this suit against Gilchrist for failing to carry out the contract with Leonard, alleging that he had been damaged thereby in the sum of $1,950.

The only question which this court passes upon is as to the authority of Nelson, as agent, to make the contract in the name of Gilchrist, which plaintiff sues upon. As to this the plaintiff, Pearson, testified as follows:

"I regarded Mr. Nelson as the agent of A. Gilchrist in Mississippi, invested with full power to represent him in all things whatsoever growing out of his wild land interests in this state, and over which, to all appearances, Mr. Nelson had full direction and authority. He so represented the fact to me; and from what I knew of Mr. Nelson in similar transactions with regard to lands belonging to the said A. Gilchrist, I did not for a moment question his power as general agent of Mr. Gilchrist, and conferred with him as such. He never intimated to me that his authority as agent was in any way limited, but impressed me that he had full control and authority in the matter."

F. C. Nelson, witness for defendant, testified substantially as follows:

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"I am a land agent, representing a number of non-residents who own land in this state. Am in the employ of defendant, Gilchrist, and, in a limited sense, I am his agent, with general supervision of his lands. My agency extends only to paying his taxes, preventing depredations, bringing suits in his name against trespassers, and looking out for purchasers of the land. I negotiate sales of the same, subject to his approval, and take and collect notes. He approves all transactions and makes deeds. I employed attorneys to defend this suit and to bring replevin for the staves supposed to have been cut on the lands of defendant. The telegram that instructed the replevin suit was sent by me under the direction of Nugent & McWillie, attorneys. That suit was brought with the knowledge of Mr. Gilchrist. He instructed me to give bond for the staves, and sell them. He sent me to Batesville to dispose of them. I have sold timber and staves for other non-residents, but have sold none for defendant. I never had any authority from him to sell timber or to purchase any thing on his account. I had no authority from him to make a compromise or settlement of the suit with Pearson or anybody else. My authority extended only to selling the staves which Mr. Gilchrist had bonded in the replevin suit. The defendant has never dealt in staves, and has no knowledge of the business; he is a banker. I did not, in my dealings with Pearson, intimate to him that my agency was a limited one. I knew I had no power to bind the defendant by any such contract as Pearson claims I made. If I had thought I had the power, I would not have entered into a contract which Mr. Gilchrist never thought of, and by which he was to be bound to the extent of several thousand dollars. The replevin suit is still pending and undetermined."

This was all the evidence on the question of agency. The defendant did not testify. The court refused to give a peremptory instruction in favor of defendant. Verdict and judgment for plaintiff in the sum of $1,950. Defendant appeals.

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Brief for appellee.

Nugent & McWillie, for appellant.

Plaintiff testified that he regarded Nelson as agent, wit full power to represent defendant in all things growing ou of his land interests in this state; that he was such agent t all appearances, and that Nelson never intimated that h authority was limited. Nelson denies plaintiff's testimon in the main, but, accepting it as true, and the authority Nelson, as agent, to make a contract was not establishe Appearances cannot be relied on to establish an agency. must be established as a fact, or the party to be bound mu hold out to the world the supposed agent as having autho ity. The effort here is to establish an agency by implicatio without evidence of facts necessary to constitute it. Se *Hood* v. *Adams*, 128 Mass., 207.

The agency of Nelson was attempted to be shown by h acts and declarations, and these matters were not brought the knowledge of the supposed principal. *Garvin* v. *Lowr* 7 Smed. & M., 24; *Kinnare* v *Gregory*, 55 Miss., 612. It w the duty of appellee to ascertain Nelson's authority. *Brow* v. *Johnson*, 12 Smed. & M., 398.

Mayes & Harris, for appellee.

The question whether Nelson was empowered to mak this contract within the scope of his actual or apparent pow was fully and fairly submitted to the jury. The verdict conclusive, unless the court shall say there was no eviden to support it.

It is true Nelson says that he was defendant's agent in limited sense, and that his agency extended only to payi taxes, preventing depredations, etc., and that he had power to bind the defendant by the contract in questio But it appears that he attended to the business with fu power, negotiated sales, took purchase-notes, paid taxes, a had general supervision of defendant's work. He broug suit on uncollected notes, and did assume to act as the age of Gilchrist to make this settlement. There was no hint

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any want of authority. Then, again, Gilchrist did not testify, and that entitled the jury to indulge in a presumption against him. Looking to all the facts—the nature of the business, and the failure of Gilchrist to testify—it cannot be said that there was no evidence to justify the finding that Nelson had authority.

Again, Gilchrist had so dealt with his interests here in connection with Nelson as apparently his general agent, that the law will hold him bound by his acts.

Looking to the nature of the proven relations, the effort of defendant to escape because of the supposed want of authority in his agent, this seems an afterthought for extrication from a repented bargain. Possibly the jury so regarded it.

CAMPBELL, C. J., delivered the opinion of the court.

Whatever may have been the authority of Nelson to represent Gilchrist as to his lands in Mississippi, there is nothing disclosed to suggest that he was authorized to bind him by a contract to purchase 60,000 staves of Pearson, and sell them to Leonard, and the instruction to the jury to find for the defendant should have been given.

Reversed, and remanded for a new trial.

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HELEN PEEBLES ET AL. v. JOEL M. ACKER.

1. WILL. *Legacy. Charge on estate. Case.*

A will contained the following provisions: "I give and bequeath to my step-daughter, out of my estate, so soon as she attains the age of sixteen, the sum of $1,200, and desire that my wife, as trustee for her, shall loan said sum after that time, until my step-daughter marries; then the same to be delivered to her." Another clause provided that the residue of the testator's estate, real, personal and mixed, should go to his wife and son, according to the laws of descent. *Held*, the legacy to the step-daughter was made a charge on the entire estate. *Cady* v. *Cady*, 67 Miss., 425.

2. SAME. *Enforcement of legacy. Purchaser.*

The charge created by such legacy on land of the estate may be enforced by the assignee of the legacy, against one who has purchased the land at trustee's sale, under a trust-deed executed by the heir and devisee of the testator.

3. LIMITATIONS. *Enforcing legacy. Administration. Purchaser.*

Where a legacy is made a charge on the estate of the testator, and certain land of the estate is sold by the heir and devisee, pending administration on the estate and before final settlement, the statute of limitations does not run against the right to enforce the legacy as to the land so held by the purchaser. So held in this case, there being no question involving the right of the purchaser to hold by adverse possession.

FROM the chancery court of Monroe county.

HON. BAXTER MCFARLAND, Chancellor.

The will of W. C. Blackburn, who died in 1859, contained the following clauses:

"2. As a token of the love and affection I bear to my step-daughter, Ada Leonora McGuire, I give and bequeath to her, out of my estate, so soon as she attains the age of sixteen years, the sum of $1,200, and desire that my wife, Mary A. Blackburn, as trustee for her, shall loan said sum, after that time, at interest, taking notes, renewed annually, with two good sureties, until she, the said Leonora, marries, then the same to be delivered to her. And it is my desire that

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she receive a good English education, to be paid for out of my estate, and that she live with my said wife during her celibacy, free of charge for board. Should she die without issue surviving her, the said legacy to her to descend to my said wife and my son William L. Blackburn. Her clothing to be paid for out of interest arising from said loaned sum."

"3. The residue of my estate, real and personal and mixed, of which I may die seized and possessed, I give and bequeath to my wife and son, to descend to them according to the present laws of descent and distribution of property of said state. It is my will that my wife keep my negroes and such of my other property together, as she may deem necessary to carry on the farm, until my said son attains the age of twenty-one years, or marries, then a division to be made of all my said residue of property, and its increase, between my wife and son."

The widow, Mary A. Blackburn, was named as executrix of the will, without bond, with power to sell any of the property devised, and invest the proceeds in other property, if to the interest of the estate.

The will was probated in 1860, and letters testamentary granted to said Mary A. Blackburn, and she continued to be executrix, and resided on the land until her death in 1887, without ever having filed an account or paid the legacy.

In 1880, William L. Blackburn, the son named in the will, presumably claiming title to the land owned by the testator, his mother having only a dower interest, executed a trust-deed thereon to secure an indebtedness to appellee, Joel M. Acker. This trust-deed was foreclosed in 1885, the land being bought in by Acker, who received a deed from the trustee.

Meantime, Ada Leonora McGuire, the above mentioned legatee, was married in 1867, at the age of twenty, to J. B. Walton, and died during her coverture, in 1870, leaving one child her sole heir. This child died in 1884, leaving the father his sole heir, and consequently owner of the unpaid

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legacy. J. B. Walton made a written assignment of th legacy to W. D. Walton, who assigned it to Helen Peeble and others, the appellants, who are the heirs of said execu trix and of William L. Blackburn.

This bill was filed in 1890 by Acker against said appel lants, who are in possession of the land, claiming the same to cancel their claim as a cloud, and for possession.

Defendants answered, and also filed a cross-bill, setting up among other things, that the legacy owned by them is charge on the land in controversy, and praying that it b subjected to the charge.

The answer of complainant to the cross-bill denies that th legacy is a charge on the land, and avers that, if it ever wa such, it has been barred by the statute of limitations of si and of ten years. It is not necessary to state the case in an other aspect. There was a final decree for complainan Acker, and defendants appeal.

Houston & Reynolds, for appellants.

1. Where the testator, after giving legacies, makes no spe cific devise of realty, but blends it with the personalty, h thereby charges the realty with the payment of the legacie 1 Redf. on Wills, 278, 279; *Cady* v. *Cady*, 67 Miss., 425 *Heatherington* v. *Lewenberg*, 61 *Ib.*, 372; *Knotts* v. *Bailey*, 5 *Ib.*, 235; *Turner* v. *Turner*, 57 *Ib.*, 775; Perry on Trust § 570; *Lewis* v. *Darling*, 16 How., 10.

2. The statute of limitations has never begun to run. Th legacy is charged on the land, and is an express trust, whic the executrix, by accepting the administration, became bour to pay. She has never been discharged, and has never a counted. No cause of action could accrue until a breach the trust, and nothing has happened to set the statute motion. *Cooper* v. *Cooper*, 61 Miss., 676; *Templeton* v. *Tom kins*, 45 *Ib.*, 424; *North* v. *James*, 61 *Ib.*, 761; *Roberts* v. *Ro erts*, 34 *Ib.*, 322.

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Opinion of the court.

Sykes & Richardson, for appellee.

Ever since 1848, our statutes have given a right of action at law to recover legacies. The trust here is an implied trust, and is not chargeable on the land; and, hence, both the six and ten-year statutes of limitations apply. Trusts sometimes arise by implication, by construing a will so as to carry out the intention of the testator. Perry on Trusts, § 121. So, whether a legacy is a charge on land is a matter of intention, to be gathered from the whole will. A mere direction that debts and legacies are to be paid, does not directly charge the realty. Perry on Trusts, § 566–572. To exempt a trust from the operation of the statute of limitations, it must be a direct trust, cognizable only in equity, and the question must arise between the trustee and *cestui que trust*. Angell on Limitations, § 166. The will charges the legacy, if at all, on both realty and personalty. There is no specific charge, and, consequently, no exclusive jurisdiction in equity. The statute, therefore, runs. 23 Pick., 313; 2 Paige, 574; Wood on Lim., 42; 11 Am. Dec., 417. We submit that the statute began to run in 1870, after the death of Mrs. Walton. If nothing else set in motion the statute, the adverse possession of Mrs. Blackburn and her son, continued to the knowledge of the *cestui que trust*, had that effect. Wood's Lim., 213; 7 How. (U. S.), 234, 819; 8 *Ib.*, 586; 9 Peters, 405.

COOPER, J., delivered the opinion of the court.

The legacy given by the will of W. C. Blackburn to Ada Leonora McGuire was charged by him upon his whole estate, both real and personal. *Knotts* v. *Bailey*, 54 Miss., 235; *Turner* v. *Turner*, 57 *Ib.*, 775; *Heatherington* v. *Lewenberg*, 61 *Ib.*, 372; *Cady* v. *Cady*, 67 *Ib.*, 425.

Whatever may be the rule elsewhere, it is settled in this state that no statute of limitations runs against a legatee, or the distributee, pending the administration of the estate. *Wren* v. *Gaydon*, 1 How., 365; *Jordan* v. *McKenzie*, 30 Miss.,

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32; *Young* v. *Cook*, *Ib.*, 320; *Roberts* v. *Roberts*, 34 *Ib.*, 322; *Cooper* v. *Cooper*, 61 *Ib.*, 676.

The lands of the testator being now owned by the appellee subject to the legacy charged on them, the court below should have granted the relief prayed by cross-complainants to sell the lands for the payment thereof.

It is to be observed that no question of the acquisition of title by Acker, the purchaser, by adverse possession, is presented by the evidence.

Decree reversed, and cause remanded.

VICKSBURG WATER SUPPLY COMPANY v. M. O. GORMAN.

1. CONTRACT. *Performance; manner of. Instruction.*

Where one contracting party is sued in damages for preventing the other from carrying out a contract to do certain work, an instruction for plaintiff is erroneous which, in effect, tells the jury that the defendant, under circumstances named therein, had no right to stop plaintiff if he was prosecuting the work with proper diligence, omitting the qualification that he was doing it in a proper *manner*.

2. SAME. *Misleading instruction. Damages.*

Such an instruction is also erroneous which refers to different occasions on which plaintiff's work was interfered with, and, accumulating the several hinderances, directs that the jury shall make the plaintiff whole "for the loss thereby occasioned," when it appears that in respect to one or more of the occasions the defendant is not liable.

3. MASTER AND SERVANT. *Act of servant outside of employment. Damages.*

Where a water company contracts for certain work to be done requiring excavations near its pump-house, and its engineer, as an accommodation for a servant of the contractor, agrees to look after a certain pump of the contractor, but negligently fails to do so, whereby the excavations are flooded from the works of the company, the latter is not liable to the contractor therefor.

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CONTRACT. *Change of plan. Preventing execution. Damages.*

Where, under a contract, work is to be done in a certain way, and, after difficulties are encountered, by mutual agreement the contractor begins anew on a different plan, but is afterwards stopped by the other party, in an action against such party for preventing the execution of the contract, the plaintiff cannot recover, as a part of his damages, the value of the work done by him before the original plan was abandoned.

PREVENTING EXECUTION OF CONTRACT. *Reasons for. Damages.*

Where work under a contract is being properly done, the fact that its further prosecution endangers certain buildings of one of the parties, is no defense to such party in an action of damages by the other party for stopping the work. If the defendant contracted for the work as being done, it can only be stopped subject to liability to the other party for preventing the execution of the contract.

SAME. *Partial completion. Cost of work increased. Damages.*

In an action by one party to a contract against the other for preventing the contract from being carried out, the wrongful conduct of the defendant increasing the cost of the work contracted for, though not a distinct cause of action under the declaration, may be considered in estimating what, if any thing, plaintiff is entitled to recover for partial completion.

FROM the circuit court of Warren county.

J. M. GIBSON, ESQ., a member of the bar, was selected by ot, and presided as special judge in this case. The HON. J. . GILLAND, Judge, having been of counsel, was disqualied.

Action of damages by appellee against appellant, arising om defendants preventing plaintiff carrying out a contract o do certain work. The water-station of the defendant, onsisting of pump-house, reservoir, and stand-pipe, is situed just east of the Mississippi river, and the Louisville, ew Orleans and Texas railroad runs between the river and he works. The pump-house was connected with the river y two large pipes or mains, which were laid in a tunnel under ground, about thirty feet from the surface, and through hich the water was pumped by the defendant for the purose of supplying the city of Vicksburg. On October 24, 889, the pipes having become broken or displaced, the de-

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fendant entered into a written contract with plaintiff to do certain work, with a view to re-establishing the water connection with the river. The contract is too voluminous to be abstracted. It is to the effect that the plaintiff was to furnish all material, tools and labor necessary for the reconstruction of the tunnel through which said pipes ran, from the pump-well of defendant to a point ninety feet west of said well, and to reset the mains and establish the connection. In order to do this, it was stipulated that plaintiff, at said point ninety feet west of the pump-house, should dig a shaft or well, and reconstruct the tunnel, or that he might dig an open ditch, and reach the pipes in that way. For this work, plaintiff was to be paid $3,200.25 within ten days after the completion and acceptance of the work; and, at the option of defendant, plaintiff was also to reconstruct the tunnel from the shaft west, to the river, if that should be deemed necessary by defendant after the other work was completed; and, for the work of reconstructing the tunnel from the shaft to the river, if done, plaintiff was to be paid an additional sum. The work first above mentioned, and for which plaintiff was to be paid the said sum of $3,200.25, was to be completed to the satisfaction of defendant, on or before the twentieth day of December, 1889.

Among other things, it was stipulated in the written contract as follows: "All loss or damage arising from the nature of the work, from the action of the elements, from any unforeseen cause, accident or obstruction, or from any difficulty that may be encountered in the prosecution of the work shall be borne by the party of the second part [plaintiff] without extra charge or claim against said water company . . . And it is hereby understood and agreed that the water company shall have the right to suspend or annul the execution of this contract at any time should the party of the second part fail to prosecute the work at a satisfactory rate of progress, or to comply with all the terms herein set forth; and such suspension or annulment shall not affect the

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right of said water company to recover any damages resulting from such failure of the party of the second part."

The declaration alleges that plaintiff proceeded to furnish all material, tools and labor, and was prosecuting the work under the contract with skill, diligence and success, and would have completed it within the time stipulated, but that, after doing part of the work, the defendant negligently permitted water from its pump-house to flow in upon and flood the work, thereby rendering the soil soft and difficult to manage, and causing plaintiff increased labor and expense, whereby plaintiff was compelled to attempt the work of reaching the tunnel by means of the open cut; that after this defendant negligently permitted the water from its pump-house to flow into the excavation or cut, impeding his work, and again putting him to great expense and trouble; but that plaintiff endeavored still to comply with said contract until January 15, 1890, when defendant compelled him to desist from the work. Plaintiff filed with the declaration an itemized account of the expense, and a statement of the value of his labor and skill, alleging that he was damaged $7,437.77.

Defendant demurred to the declaration, and the demurrer was overruled. In view of the opinion of the court, it is not deemed necessary to state the grounds of the demurrer. Defendant also moved the court to require plaintiff to amend the declaration, so that it might appear more definitely whether the cause of action is based upon negligence or for breach of contract—whether *ex delicto* or *ex contractu*—and this motion was overruled. The defendant then pleaded the general issue, and gave notice thereunder of contributory negligence on the part of plaintiff; also that the flooding complained of was caused by the accidental breaking of one of its pipes, which breaking could not be foreseen or avoided; that the loss sustained by plaintiff resulted from unforeseen causes, and from the action of the elements; that plaintiff failed to comply with the contract,

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and had failed to prosecute the work at a satisfactory rate of progress; that the failure to complete the work was due to his own neglect and want of skill; that he negligently made excavations, and failed to take proper precautions to prevent water going into the same; that by reason of the negligent work of plaintiff, the building of defendant was endangered, and that the further prosecution of the work would have greatly endangered the building by the annual overflow of the Mississippi river, which would have been inevitable before the work could have been completed as plaintiff was then progressing; that defendant had been greatly damaged by the negligent work of plaintiff.

Plaintiff's testimony tends to show that he furnished all the material, tools and labor necessary to complete the work according to the contract, and went to work diligently on the twenty-eighth day of October, 1889, and would have complied with the contract within the time limited but for the negligence of defendant. He had begun the shaft at the point indicated in order to reach the broken pipe connection, and the shaft was about twenty-two feet deep by the fourth of November, 1889. He had placed the earth excavated from it around the mouth, like a levee, to protect it from water running in. He discovered that the drain-pipe, coming from defendant's pump-house, and discharging waste-water from its engine (which was pumping water from the river), was broken, and, on the fourth of November, called the attention of the superintendent of defendant to the broken pipe, and to the danger of the shaft being flooded. But the pipe was not fixed, and that night the water from it broke through the levee and filled the shaft. Prior to this, plaintiff's testimony tended to show, the ground was firm. The attention of defendant's superintendent being called to this, plaintiff's testimony showed that he admitted that the engineer of defendant had been at fault, and told plaintiff to bail out the water, and that he would make the loss good. The evidence was somewhat conflicting on the question as to whether plaint-

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iff was at fault or was guilty of contributory negligence as to this flooding, and as to whether it made the ground wet after the water was taken out. The proof showed that the soil was like quicksand, and, when wet and soft, it was with great difficulty that it could be handled. After this occurrence of November 5, plaintiff bailed the water out, and carried the shaft to the bottom, timbering it, which was made necessary, as he contended, by the flooding. He then opened the tunnel, twelve feet from the bottom of the shaft, in the direction of the pump-house, and timbered that. Defendant's testimony tended to show that the soil at the bottom of the shaft, and in the vicinity of the old tunnel, was soft and saturated with water from springs, and not from defendant's pumps; but there was a conflict of testimony as to this. Plaintiff dug a basin at the foot of the shaft to hold the seepage-water, and put a pump in it to take the water out. This pump was at first driven by steam, but the superintendent of the company suggested that plaintiff should run the pump by water-pressure by a pipe from defendant's pump-house. This pump was put in. It was a siphon. When the stream of water from the pump-house was turned on with sufficient pressure, it would pump the water out of the catch-basin, but, when the pressure was not sufficient to run the siphon, it would fill the shaft with water. On the night of November 17, 1889, plaintiff's engineer, being sick, asked the engineer of defendant to run this pump for him. He was instructed how to turn on the water so as to get the right pressure, but he turned it on insufficiently, and the consequence was that the water failed to go out through the siphon, and the shaft was that night flooded with water to within ten feet of the top. This was the second accident.

After this, owing to the conditions, and especially the character of the wet soil, it seemed almost impossible to carry out the work by means of the tunnel, but plaintiff continued to labor at it until December 5, when he had a conversation with the superintendent of defendant, who advised

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him to close up the end of the tunnel and make an open cut—that is to say, commence at the top of the ground and dig a ditch down to the bottom of the tunnel, removing all the dirt from the cut, and driving piles on the sides to prevent caving, bracing the piling and planking it up on the sides. Thereupon, on the suggestion of defendant's superintendent, plaintiff abandoned the tunnel, and went to work to reach the pipes by means of the open cut, and he was told by the superintendent that he should have all the time needed to complete the work. In consequence of being wet, the earth was soft and oozed up, and plaintiff was compelled to go to the expense of procuring a pile-driver, and an engine to run it, in order to drive piling on the sides of the ditch, and he was also compelled to go to additional expense of procuring large timbers for the piling, and an engine to hoist the material.

Plaintiff's testimony tends to show that he then proceeded with the work satisfactorily, considering the difficulties, until about the first of January, 1890, when the water came in through the breaking of a defective pipe in defendant's pump-house, and filled the ditch which plaintiff was digging. The pipe, which plaintiff's testimony tends to show was defective, and which burst, causing the open cut to be overflowed, was one of the large pipes that conveyed the water pumped by defendant's engine, from the reservoir to the stand-pipe, and had a heavy pressure on it. The testimony tends to show that plaintiff called attention of defendant's engineer to defects in this pipe, and requested him to fix it, telling him, at the same time, that there was danger that the water from the stand-pipe would flood his work. Nothing was done, and the next morning the open cut was flooded with water, as above stated. Defendant introduced evidence tending to show that, just before the breaking of the pipe in the pump-house, it was examined by defendant's engineer in company with the engineer of plaintiff, and that they found no defect therein.

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After this flooding, plaintiff pumped the water out, and again went on with the work, as the evidence tends to show, with diligence, until about the fifteenth of January, when he was compelled by defendant to quit work. At that time he had nearly two-thirds of the cut finished. It was about twenty feet deep at the west end, and about six feet deep at the east end.

The testimony for defendant tends to show that the method adopted by plaintiff, and the plan for his piles, were inadequate, expensive and impracticable; that the work was not properly protected by the piling, and that the quicksand and soft earth filled in after if was removed; that the work could not be completed according to his plans; and, as it stood when plaintiff was stopped, it endangered the building of defendant, which was liable to fall down; that the work had then long been delayed, and that the flood level of the Mississippi river was then far above the bottom of the excavation; that there was a threatened overflow of the river, in the event of which there would be no way to protect the building except to stop the work immediately, and fill up the excavation, which was done by the company; that about two weeks after the work was stopped, it was overflowed by the river.

Plaintiff's testimony tends to show that, but for the flooding, he would have completed the work at the cost of $1,550, leaving a profit of $1,650.25; that he was put to extra expense, amounting to $3,131.53, which sum he had expended on the work; that this did not include his own services, or any profit; and that if he had not been interfered with by defendant, he would have completed the work in about three weeks, whereas he was engaged nearly three months.

The following instructions were given for the plaintiff:

"1. If the jury believe from the evidence that the defendant negligently permitted the water from its pump-house to flood the work, and thereby increased its difficulty, and put the plaintiff to extra expense over and above what the work

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would have otherwise cost him, and delayed the work, that it could not, with reasonable diligence, be complete within the contract time, and that the defendant extend the time for the completion of the work to such time might be reasonably necessary therefor, and that the plainti while engaged in prosecuting the work with such reasonab diligence, was notified by defendant to quit, and compelle with threats of arrest, to quit the work, and was there prevented from completing the same, the jury will find f the plaintiff, and assess his damages at such sum of mon as will make the plaintiff whole for the loss thereby sustain by the plaintiff.

"2. In assessing the plaintiff's damage as aforesaid, t jury should give the plaintiff a sum which the evidence m show he would have made as a profit on the original job, a also such additional sum as the evidence may show the wo done by him reasonably cost.

"3. It was the duty of the defendant to keep its pipes a appliances in reasonably safe condition and repair, so as not injure the work, and if the jury believe from the evide that the defendant, when his attention was called to the c dition of the pipe in the pump-house, could have ascertain by applying reasonable tests, that the pipe was defective, a yet that the defendant neglected to apply such tests, then defendant is liable for the consequent bursting of that pip

The following instructions were given for defendant, words in italics the court having added by way of modifi tion:

"3. The court instructs the jury that defendant is not lia to plaintiff for any damage on account of the flooding of tunnel about the night of November 17th, 1889, on acco of the failure of the action of the siphon pump, and the fendant is not in any way responsible for any delay cau thereby to plaintiff's work, or for any extra expense to wh plaintiff was put in consequence thereof."

"6. If the jury believe from the evidence in this case, t

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e night of the fifth of November, the shaft was flooded water from a break in defendant's waste-pipe, and if further believe that the plaintiff knew of such break, the danger of the flow of water therefrom, and could elf, by taking the proper means of precaution, or by ordinary care, have protected his shaft from such dand prevented the flow into the same, and the plaintiff to do so, then, in such case, the defendant is not liable at accident."

6. If from the evidence the jury believe that the plaintiff of the danger of water flowing into his shaft on the fifth ovember, and took no steps to prevent it, then the dent is not liable for the accident. Although the jury may e that said flooding of said shaft may have been caused e negligence of the defendant, yet it was equally the of the plaintiff, if he knew of the danger, to have taken means as a careful and prudent man would, under the mstances, to have prevented the accident, and if he failed so, he cannot hold the defendant liable for the act."

7. The plaintiff cannot recover of the defendant for any ge caused by the breaking of the pipe in the pump- unless the evidence shows that the breaking of said was caused by some act of negligence or carelessness e part of the defendant.

8. If the jury believe that, just prior to the breaking of pipe, it was examined by the engineer of the water- s company, in company with the engineer of the plaintnd they found no defect in the pipe that broke, and, er, that defendant had no reason to believe that the was defective, then they are not responsible to the tiff for its breaking.

9. If the jury believe that there was a drain-pipe from ellar, and that the end of this had been covered by the tiff so that the water from said cellar could not be ed away; and if they further believe that the water d from a break in defendant's pipe into the cellar, and

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thence into the plaintiff's work, but that it would not ha done so if the drain-pipe had not been closed, then defen ant is not liable.

"20. It is incumbent upon the plaintiff, before he can r cover, to establish, by a preponderance of the evidence, the satisfaction of the jury, all the facts or fact for whi defendant is liable.

"21. Before the jury should hold the defendant liable ev for the flooding of the shaft or open cut by water from d fendant's work, they should be satisfied, by a preponderan of the evidence, that such flooding was caused by the neg gence or carelessness of defendant. But, if such acciden or either of them, was due to the negligence of the plainti or due to the nature of the work, action of the elemen any unforeseen cause, or obstruction or accident *without fa of defendant*, or any difficulty that was encountered in t prosecution of the work, then, in such case, the defendant not liable.

"22. It was the duty of the plaintiff to have prosecut his work with diligence, and at a reasonable and satisfacto rate of progress; and if, from the evidence, the jury belie that the plaintiff, on the fifteenth day of January, 1890, w not prosecuting said work at a reasonable and satisfacto rate of progress, and had not been so prosecuting it befo then, *and defendant was without fault as to accident or del* then the defendant had the right to stop said work, and t plaintiff is not entitled to recover.

"23. If the jury should believe from the evidence in t case that, on the fifteenth day of January, the work was progressing satisfactorily, and that it was not likely to finished without endangering the building from the floods the river, then they should find for the defendant, *provi the failure to have made such satisfactory progress was not to the negligence of defendant.*

"24. If the evidence shows that the accidents to plaintif work, and the difficulty encountered, were not due to defe

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ant's negligence, and that on the fifteenth day of January, 1890, and before then, the work was not progressing at a reasonable and satisfactory rate of progress, then plaintiff cannot recover.

"25. If, from the evidence, it be uncertain in the mind of the jury whether the expenses incurred by Gorman, and difficulties he encountered, were due to elements and the character of the soil and surrounding conditions, or to the flow of water caused by the negligence of the defendant, they should resolve such issue in favor of the defendant.

"26. If the jury should believe that the defendant was at fault, and caused the accident of the flood of November 5, but was not at fault otherwise, then they can only find for plaintiff for the injury directly due to said accident."

Besides a peremptory instruction to find for defendant, the following instructions asked by it were refused:

"2. The defendant is not liable for any injury to plaintiff, or for any delay in prosecuting his work which may have been occasioned by the flowing of water into his shaft on or about the night of November 5, 1889, from defendant's waste-pipe."

"4. The court instructs the jury that the defendant is not liable to the plaintiff for any damage, delay or injury done him in and about the prosecution of the work caused by the breaking of defendant's pipe in its pump-house on or about the night of January 4, 1890, and by the flowing of the water, in consequence, into the open cut of plaintiff's work.

"5. Under the proof in this case, the defendant is not liable to plaintiff for any damages or injury resulting to him, or for any delay in the prosecution of the work, or for any extra expense incurred by him, either by reason of the flowing of water into the shaft from defendant's waste-pipe, on or about November 5, 1889, or from the flooding of his tunnel, on or about November 17, from the siphon pump, or by reason of the breaking of defendant's pipe in its pump-house, and the flow of water therefrom into the open cut made by plaintiff, on or about the night of January 4, 1890."

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"7. If, from the evidence, the jury should believe that, on the fifteenth day of January, 1890, the pump-house of defendant was endangered by the then condition of the work, then the defendant had a right to stop the work, and is not liable to the plaintiff for any damage resulting from such stoppage.

"8. If the jury believe, from the evidence, that, as a matter of prudence, it was proper that the prosecution of the work on the fifteenth day of January should have been stopped on the fifteenth day of January, in order to avert any threatened danger, as may be shown by evidence, to said building, then the defendant is not liable to the plaintiff for having stopped the work.

"9. If, from the evidence, the jury believe that, on the fifteenth day of January, 1890, the defendant had reasonable ground to apprehend that a further prosecution of the work as it was then being conducted by the plaintiff would endanger defendant's building, then the defendant had a right to stop the work, and the defendant is not liable to plaintiff for such stopping.

"10. If, from the evidence, the jury believe that on the fifteenth day of January, 1890, the condition of the work, as it was then, endangered the defendant's building, or if they believe that the further prosecution of the work in the manner in which it was being conducted would endanger it, or that it would be endangered by the threatened overflow of the Mississippi river, which the evidence shows may have been impending before the said plaintiff could complete said work, then the defendant had a right to stop the work, and is not liable to the plaintiff.

"11. If the evidence shows that the accidents to plaintiff's work were not caused by defendant's negligence, and that the work, on January 15, as then being prosecuted, was not, and had not been, at a reasonable rate of progress, or was endangering defendant's pump-house, then defendant cannot recover.

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Brief for appellant.

"12. If the engineer of plaintiff undertook, in company with that of defendant, to examine the pipe just before it broke to ascertain any defect, then plaintiff cannot complain that such examination was not carefully made.

"13. The defendant had a right to stop the work of plaintiff if said work was not being prosecuted at a satisfactory rate of progress, and, of this, it was the option and right of defendant to determine reasonably according to its judgment and stand-point.

"14. This being an action *ex contractu*, the plaintiff is not entitled to recover for damages incurred by reason of any negligence of defendant in operating its works, by reason whereof plaintiff's works were flooded with water.

"15. The plaintiff is not entitled to recover for any profits he may have made on the work, and for his services also."

The jury found for plaintiff in the sum of $3,131.50, with interest from January 25, 1890, aggregating $3,473.73, and judgment was entered accordingly. Defendant's motion for a new trial being overruled, he appealed. The opinion contains a further statement of the case.

L. H. Magruder, for appellant.

1. Plaintiff's first instruction is erroneous. Something more than mere diligence on plaintiff's part was involved. There is abundant testimony to show that the work was not being *properly* done; that it was useless, besides endangering defendant's building.

This instruction is also erroneous, because it is in direct conflict with defendant's third instruction, to the effect that plaintiff could not recover by reason of the flooding occurring on the night of November 17th. The accident of November 5th was of trifling character, and the testimony shows that $75 would have been a reasonable allowance therefor. For all the hinderances, the whole of the work and all expenses, the jury charged the defendant under this instruction.

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The converse of the first-mentioned proposition is embraced in defendant's 7th, 8th and 9th instructions, which should have been given, but were refused. If defendant's building was endangered by the existing condition of the work, and its further prosecution, defendant had a right to stop plaintiff. The universal rule is that where an employe refuses to complete the work, or fails to do so, he can only recover from the employer the contract price of the work, less cost of completion. 2 Sutherland on Dam., title Employer and Employe.

The error in refusing defendant's 11th instruction is plainer still. That error was not cured by any of the instructions that were given. If plaintiff had not complied with his contract, and, besides, was endangering defendant's building, manifestly defendant had a right to stop the work. The evidence is undisputed that the building was endangered because of the manner in which the work was being executed, and because of the anticipated flood of the river. If the building was in danger, then, the work being valueless, defendant's only remedy was to fill the excavation, and the plaintiff could not recover any thing.

2. Plaintiff's second instruction should not have been given. It is well settled that, in cases like this, the employer has a right to abandon the work, and stop the contractor from further progress, being liable, of course, for all consequences resulting from a breach of the contract. The contractor may sue on the contract, in which case the measure of damages is the contract price reduced by such amount as would reasonably suffice to finish the job; or he may ignore the broken contract, and sue on a *quantum meruit*. In either case, the true question is, *what was the work worth? Whitfield* v. *Zellnor*, 24 Miss., 663; 39 Md., 194; 80 Ill., 493; 7 Hill (N. Y.), 61; 8 Wall., 77; *United States* v. *Behan*, 110 U. S., 338.

A party cannot, at the same time, hold on to a contract and abandon it; he cannot claim profit under it, and repudi-

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Brief for appellant.

he contract price, as the plaintiff attempts to do in this

is is clearly not a suit on the contract. If it were, there
l be no demand for the sum in excess of the contract
. Plaintiff has, by the form of his action, if not other-
rescinded the contract, and sues on a *quantum meruit.*
being so, there can be no question of loss or profit. The
tion is as to the reasonable value of the work done.
instruction given for plaintiff tells the jury, in effect,
defendant must pay for all work done, whether properly
or not, and for all material used.

r the accident of November 5, defendant is not liable,
its second instruction ought to have been given. The
ence shows that the shaft was a mere hole in the ground,
h could have been easily protected. It was the plaint-
negligence that the water ran into it, and, besides, the
er was of insignificant consequence.

Defendant's fourth instruction, to the effect that it was
iable for the breaking of the main pipe in the pump-
e about January 1, should have been given. There is
vidence whatever upon which to base negligence against
ndant for the breaking of that pipe, except the mere fact
it broke. The defendant was not called upon by any
mstances to make an examination or a test of that part
e pipe. There are defects in iron pipes which, curiously
gh, result in accidents under any circumstances. The
fact that the pipe burst is no evidence of negligence.
general rule is, that the burden in an issue of negligence
the plaintiff to prove it. 1 Sher. & Redf. on Neg., § 57.
ere are conditions under which the very happening of a
ter carries evidence of negligence. But these are ex-
ons to the well-established general rule; they must
selves be assignable to some principle justifying the ex-
on. *Ib.*, 59. Here the nature of the use and of the
lty indicate that the accident must have been a result of
ret defect, of which defendant could have had no notice

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Brief for appellee.

and no especial knowledge. It falls within the class mentioned in Rorer on Railroads, 1200, 1201.

4. The verdict in this case is so unjust and unrighteous that it is almost wicked, and, for the errors assigned, I confidently believe it ought to be reversed.

M. Marshall, for appellee.

Independently of the general duty every man owes to others, there arose from the contractual relations between the parties an obligation on the part of defendant to do every thing expressly undertaken, and impliedly such things as were necessary to the successful carrying out of the contract, and to refrain from interference therewith. Defendant did not exercise a higher degree of care than it owed under its contractual relations, and did not perform the duty it would have owed even to a stranger. It negligently flooded plaintiff's work three times. It might have been sufficient for plaintiff to have rested his case *prima facie* upon the mere happening of these things. 2 Thomp. on Neg., 1228, 1229, 1230. But plaintiff's case did not rest upon the general presumption; defendant was guilty of neglect of its duty of guarding against the danger arising from the operation of its own water-works. The occurrences of November 5 and 17, and that which happened between January 1 and 4, demonstrated culpable negligence on the part of defendant.

As to the first flooding, the defense is contributory negligence. But plaintiff used ordinary care. Again, his failure to anticipate negligence on the part of the defendant was not contributory negligence. 2 Thomp. on Neg., 1160, 1172. While, ordinarily, the defendant would not have been an insurer against the consequences of the acts of its engineer, yet, if the acts were wrongful *per se*, it is liable. *Ib.*, 1235, If it had wilfully flooded the work of plaintiff, it would have been deprived of the defense of contributory negligence. Here it was guilty of negligence after due warning. Independently of the contract, it was bound to use reasonable

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Brief for appellee.

to guard against injury to plaintiff. 2 Thomp. on Neg., , 1234.

s to the flooding of November 17, it is an improper use erms to say that the engineer of defendant undertook to on the water as an act of accommodation to plaintiff. it is a mistake to suppose that one can undertake a duty as not bound to undertake, and, failing to discharge it care, leave the other party relying upon him to suffer consequences.

s to the third flooding, about January 1, when the atten- of defendant's engineer was called to the condition of pipe with a heavy pressure on it, it was the duty of de- ant to take steps and ascertain what its condition was as afety; yet nothing was done. It is no answer to say that ntiff's engineer examined the pipe. It was out of his of business to determine as to its safety.

he instructions for defendant gave it all that it was entitled nd more. Every defense it was entitled to make was fairly nitted to the jury. It was proper to refuse the peremptory ruction and the others which were asked by defendant. se were based upon the idea that there were no circum- ces to be determined by the jury. The circumstances of application to them were complicated and involved, de- ding upon conflicting testimony. See 2 Thomp. on Neg., , 1236. The question of negligence is a mixed one of and facts, to be determined by the jury where the facts controverted. *Ib.*, 1664, 1665, 1666.

was proper to refuse the instructions which stated that ndant had a right to stop the work if its property was danger. It could not save itself at the expense of ntiff.

he right of defendant to stop the work under the terms he contract was conditional upon the failure of plaintiff roperly carry it out, and not upon any danger to the p-house. Defendant's refused instructions sought to e its danger without plaintiff's fault deprive him of the

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right of compensation. On this point see Bishop on Co § 1431; *Ib.*, § 1441 *et seq.*

Defendant's 14th instruction was properly refused. T form of the declaration is immaterial. It is sufficient state the facts in ordinary and concise language. Code 18 § 1536. But, treating this as an action *ex contractu*, if co plete performance of the contract be prevented by eith party, the other, who is able and willing to perform, shall compensated in damages to the extent of the making h whole. *Friedlander* v. *Pugh*, 43 Miss., 111; Bishop on Co § 1431.

There is no ground of objection to plaintiff's first instru tion. If plaintiff had completed the work, it would ha cost him, but for the act of defendant, $1,550, and he wou have made $1,650.25, yet he was allowed nothing on accou of profit. The verdict gave him only what the work co The plaintiff did not sue for the contract price. The dama that he suffered was the loss of every dollar that he had e pended, and his profit. There was no conflict of evidence to what this was. The sole controversy was: (1) Wheth defendant was negligent, (2) whether plaintiff was gui of contributory negligence, (3) whether defendant had t right to stop the work scathless.

Argued orally by *L. H. Magruder*, for appellant, and *Marshall*, for appellee.

CAMPBELL, C. J., delivered the opinion of the court.

The first instruction for the plaintiff is erroneous, omitting the qualification that the prosecution of the wo was in a proper manner as well as with proper diligen Even if it was being prosecuted diligently, if it was not do properly, the plaintiff cannot complain of being stopp Another objection to this instruction is that it seems point to the several occasions when water from the pum house flooded the work-place of the plaintiff, and, accum

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lating the several hinderances he suffered from these combined, directs the jury to make the plaintiff whole "for the loss thereby occasioned the plaintiff." There should not be such blending, for the loss from the overflow of November 5 was a thing by itself, having no sort of connection with what subsequently occurred. It stood alone, and, if the defendant was liable for that, it is merely an item of the plaintiff's claim, and should not be made to form part of a structure on which to found a claim for what occurred afterwards. The court instructed the jury that, for the flowing of water on the seventeenth of November, the defendant was not liable, and yet the first instruction for the plaintiff is broad enough, and was probably understood to embrace the occurrence of November 17 as one of the hinderances to plaintiff, for it was after November 17, and when the plaintiff complained to the superintendent of the defendant of this hinderance, that he was told he could have all the time needed. The several different occurrences should be viewed separately, for they are quite distinct. That of November 5 was not only trivial and insignificant, but has no connection with any other. For that of November 17, the defendant was held not liable.

The plaintiff continued his operations until, baffled by the difficulties encountered, he sought and obtained the opinion of the superintendent of the defendant, who advised him to quit the subterranean work, and dig an open trench. This was December 5, and after this the plaintiff abandoned his former work, and began anew on a different plan. Certainly, for all the work done prior to this, the plaintiff has no claim on the defendant. That was a loss to him which cannot be visited on the defendant. The plaintiff's claim, besides the item of November 5, must begin on or after December 5, with the open ditch or canal, and be confined to what pertains to that. If wrongfully prevented by the defendant from executing his contract by the new plan, he should recover the value of what was actually done in execution of

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the contract, and any specific damage which he shows he sustained by the wrongful acts of the defendant. Therefore, the second instruction for the plaintiff is not applicable, and should not have been given.

The defendant's theory of the case was fairly submitted to the jury by the instructions given for it, and no error is perceived in the action of the court refusing a number of instructions asked by the defendant, or in the modification of those given.

Several of the instructions refused assert the right of the defendant to stop the work on the canal without liability, if thereby the safety of its buildings was threatened. That depends on whether the work was being properly prosecuted. If it was, it was not the right of the defendant to stop the work at the cost of the plaintiff. If it contracted for the work as being done, and, because of a rise in the river or other occurrence, it became more desirable to stop the work than to permit its completion, it could do so only subject to liability for any wrong thereby done to the plaintiff.

The fourteenth instruction for defendant was properly refused, because, while the alleged injury by overflowing the canal from the pump-house of the defendant is not a distinct cause of action and ground of recovery of damages for it in this action, it was a matter for consideration in estimating what, if any thing, the plaintiff may recover for the partial completion of the work contracted for. If the work done was recoverable for, and it was made more costly to the plaintiff by the wrongful act of the defendant, due allowance should be made for that in determining the amount of recovery for partial execution of the contract.

Reversed, and remanded for a new trial.

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Statement of the case.

S. PICARD v. E. SHANTZ.

RELEASE OF SURETY. *Building contract. Anticipating payments.*

A stipulation in a building contract that payments shall be in fixed installments, the last when the house is completed, is a security for the execution of the contract, which inures to a surety of the contractor, and, to the extent that the surety is deprived thereof by the owner's act in anticipating payments, he is discharged.

FROM the circuit court of Harrison county.

HON. S. H. TERRAL, Judge.

Appellee, Mrs. Shantz, and one Collins entered into a written contract, by which the latter agreed to build for her a house for $1,000, she agreeing to make payments on installments as the work progressed, the last payment of $250 to be made when the building was completed. Appellee required security for the faithful performance of the contract, and appellant, Picard, by written instrument, became "surety to the amount of $250 that Collins would fill his contract for the building of the house according to the plans and specifications." During the progress of the work, Collins, without the knowledge of Picard, was paid somewhat more than the installments called for by the contract, and after the aggregate payments to him amounted to $925, he abandoned the work, and Mrs. Shantz was compelled, in completing her house, to incur expense as stated in the opinion. She has brought this action against Collins and Picard, the surety, demanding of them the sum of $250, the amount claimed to have been expended by her in finishing the house.

There was some evidence tending to show that Collins had procured the last payment to be anticipated by falsely representing that he needed it to pay freight on certain building material.

On the trial the court instructed for plaintiff that if appellee

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was compelled by Collins' abandonment of the work to expend $200 in completing the house, she was entitled to recover said sum. An instruction asked by defendant, Picard, that he was released as surety by the act of the owner in anticipating payments, was refused. Plaintiff had a verdict for $215, $26.90 of which was remitted by her, and judgment entered for $188.10. Motion for new trial overruled, and defendant, Picard, appeals.

W. A. White, for appellant.

A creditor must not do any act which increases the hazard of the surety (Brandt on Suretyship, § 261; *Johnson* v. *Planters' Bank*, 4 Smed. & M., 171); nor vary the contract (Brandt, § 330; 2 Wall., 219); even though the variation is for the surety's benefit (Brandt, § 336; 9 Am. & Eng. Enc. L., 83, note 1). A surety on a builder's contract is discharged if the owner pays the principal faster than the contract provides. Brandt, § 345; 1 Lawson's Rights, Rem. & Pr., § 2484.

By the judgment in this case, plaintiff not only recovered the amount lost—*i. e.*, the total cost of the house in excess of the contract price—but has made a clear profit of $113.10, as a simple calculation will show.

W. H. Maybin and *W. G. Evans, Jr.*, for appellee.

In any view of the evidence, plaintiff has expended $75 more than the contract price. To this extent, if to no more, the contract has been broken, and, for this, appellant is, beyond doubt, liable. If this is held a just measure of damages, appellant will here enter the proper remittitur.

Picard is liable for the amount lost by plaintiff, because Collins procured the payments to be anticipated by his own fraudulent representations. The surety cannot escape by setting up the fraud of his principal for whom he has vouched. See *Bank* v. *Neeley*, 7 How., 80; *Montgomery* v. *Kellogg*, 43 Miss., 486. Wherever the principal is bound, the surety is

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bound. *Montgomery* v. *Dillingham*, 3 Smed. & M., 647 s.c. 7 *Ib.*, 449.

COOPER, J., delivered the opinion of the court.

The stipulation of the contract that payments should be made by Mrs. Shantz to Collins, the contractor, by installments as the work progressed, and that the last payment of two hundred and fifty dollars should be payable only on completion of the house, operated as security to her for the execution of his contract by Collins. Upon familiar and settled principles, Picard, surety for Collins, was entitled to the benefit thereof, and, to the extent that he was deprived of this security by the acts of Mrs. Shantz in anticipating payment to the contractor, he is discharged as surety. *Law* v. *East India Co.*, 4 Ves., Jr., 824; *Hays* v. *Ward*, 4 Johns. Ch., 122; *Stevens* v. *Cooper*, 1 Johns. Ch., 425; *Navigation Co.* v. *Rolt*, 6 C. B., N. S., 550; *Calvert* v. *Dock Co.*, 2 Keen, 638; *Ward* v. *Voss*, 7 Leigh, 135; *Neff's Appeal*, 9 W. & S., 36; *Clopton* v. *Spratt*, 52 Miss., 251; *Pain* v. *Packard*, 2 Am. Lead. Cas., 362.

It is impossible to discover, from the evidence in this cause, the extent of the recovery to which the plaintiff is entitled. The evidence is that, after Collins, the contractor, had abandoned the work, Mrs. Shantz proceeded to have the house finished, and in so doing, and also in building a front fence, she expended two hundred and fifty or three hundred dollars. But Collins had not contracted to make the fence, and, as to that, there was no obligation upon Picard, the surety. It does not appear how much was expended in completing the house, which was the only work Picard become surety that Collins should do.

The judgment is reversed, and cause remanded.

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Statement of the case.

W. S. P. CLAUGHTON v. JAS. G. CLAUGHTON ET AL.

1. PARTITION. *Adverse claim. Jurisdiction. Code* 1880, § 2576.

Under § 2576, code 1880, the chancery court has jurisdiction in a partit suit to adjudicate all conflicting claims or controversies between th properly joined as parties. This is true, even where a defend alleged to be a co-tenant, denies that he is such, and asserts an adv title in himself. *Nugent* v. *Powell*, 63 Miss., 99.

2. ADVERSE POSSESSION. *Husband and wife. Joint occupancy. Title.*

Where a husband has conveyed land to his wife, although confesse in fraud of his creditors, and they continue, as before, to occupy it gether as their home, their joint possession will be referred to her t and, after her death, he cannot claim, as against her heirs, that his session was adverse to her.

FROM the chancery court of Franklin county.

HON. CLAUDE PINTARD, Chancellor.

James G. Claughton and others, appellees, exhibited t bill against W. S. P. Claughton and others, to obtain pa tion of certain land, which the bill alleges complainants a defendants, as heirs of Nancy Claughton, owned as tena in common.

Defendant, W. S. P. Claughton, is the surviving husba of Nancy Claughton, who died in 1888, and the remain parties to the suit are her children. The real and only c troversy in the case arises on the adverse claim of title up by W. S. P. Claughton, the husband. By his separ answer he denies that his wife ever had any title to the la and averred that he had been in adverse possession for m than ten years, and his claim of title had been acquiesced in his wife and all others. He admitted that he had at one ti executed a trust-deed conveying the land to one Seale trustee, and that the latter had sold the land and execute deed to Nancy Claughton, the beneficiary, but says the tr deed and the conveyance by the trustee were both volunt

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Brief for appellant.

and for the purpose of protecting the lands from a threatened suit against him; that the deed to Nancy Claughton, though recorded, was never delivered to her, and she never claimed ownership under it. The testimony taken in support of this answer showed that W. S. P. Claughton executed the trust-deed to Seale at a time when he was surety on a sheriff's bond, his avowed purpose being to place the land beyond the reach of execution. There was some evidence tending to show that W. S. P. Claughton had always claimed to own the land, and that his wife had never claimed to be the owner. But it is not denied that, up to the time of her death, the wife had lived with her husband and their family on the land.

The foregoing statement is sufficient for an understanding of the only questions passed on by the court. The decree was in favor of complainants.

Section 2576, code 1880, the construction of which is involved in the opinion, is as follows: "If the title of the complainant seeking partition or sale of land for a division of its proceeds shall be controverted, it shall not be necessary for the court to dismiss the bill or delay the suit for an action at law to try the title, but the question of title shall be tried and determined in said suit by the chancery court, which shall have power to determine all questions of title, and to remove clouds upon the title of any of the lands whereof partition is sought, and to apportion incumbrances, if partition is made of land incumbered, and it is deemed proper to do so; and said court in such suit may adjust equities and determine all the claims of the several parties thereto as to the lands whereof partition or sale is sought.

Cassedy & Williams, for appellant.

1. The answer of appellant raised a pure and simple issue of title to the land, and the court had no jurisdiction to proceed further with the partition suit. *Nugent* v. *Powell*, 63 Miss., 99; *Cooper* v. *Fox*, 67 *Ib.*, 237. Section 2576, code 1880, does not enlarge the jurisdiction to the extent claimed.

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2. The binding force, as between the parties, of a d made in fraud of creditors is conceded. Its true charac is set up in the answer to show that Mrs. Claughton h the land under a secret trust for the real owner, her husba and that she never claimed title under it. The reconv ance only made visible his ownership, which all the wh secretly existed. 29 Barb., 485; 3 Baxter, 12; 6 Wis., 1 96 Ind., 505; 88 N. C., 256.

3. The adverse possession of the husband is not deni There is no reason why adverse possession may not be serted by husband against his wife. Her disabilities h been completely removed. The same result should foll as to his. See *Hartman* v. *Nettles*, 64 Miss., 495; *Massey Rimmer*, 69 *Ib.*, 667.

A. H. Geisenberger and *J. J. Proby*, for appellees.

The complainants and defendants are co-tenants, and their conflicting claims may be adjudicated in this s Code 1880, § 2576; *Nugent* v. *Powell*, 63 Miss., 99; *Cooper Fox*, 67 *Ib.*, 237. The possession of the husband, being la ful, was not adverse. *Hignite* v. *Hignite*, 65 Miss., 447; *I* v. *Davis*, 64 *Ib.*, 253. W. S. P. Claughton had no color title, and his possession, as being adverse, was, at mos question of fact, and was adjudicated against him by decree.

CAMPBELL, C. J., delivered the opinion of the court.

The objection that the chancery court did not have ju diction to try the disputed claim of title between the part because the defendant asserted title in himself, and den the claim of the complainants, is without force, and rece no support from either case cited for it. On the contrary was distinctly announced in *Nugent* v. *Powell*, 63 Miss., that the statute (§ 2576 of the code of 1880) authorized court to settle all the conflicting claims of such partie were properly joined as co-tenants, but it is not allow

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Opinion of the court.

ring into a suit between co-tenants one who is not alleged e such; and, in *Cooper* v. *Fox*, 67 Miss., 237, the same was announced—*i. e.*, "Only those having an interest in esult sought—the partition—can be made parties." The ssary implication of this is, that all having an interest ie partition sought are to be parties. To hold otherwise ld nullify the statute, and compel a resort to law to try in every case in which the defendant set up title in him- a result the statute was designed to prevent. The court power to decree partition between co-tenants, and must ble to determine whether those alleged to be are such or otherwise it would be balked in every instance of dis- as to the existence of this relation between the parties. as full power to adjust all claims and administer appro- te relief in partition suits between all proper parties, does not lose this power by the assertion of a party that not a co-tenant. That is the essential matter, without h a decree for partition cannot be made; and, when put sue, it must be decided by the court in which the suit is ling.

ie decree is clearly right. The case might have been set iearing on the bill and answer, and a decree for partition ld have followed. No testimony was needed. The claim tle by the appellant on the facts stated by his answer is out any—the least—support. The title was, by his fraud- t act, vested securely, as against him, in his wife, who lived died the owner, never having conveyed it. His claim by gnition and acquiescence of his wife and by adverse pos- on is frivolous. His wife was in possession with him, and itle was in her, and the mixed or joint possession was able to the title. It was the possession of the wife, and usiness done by him with this property of the wife, and claimed as evidence of title in him by consent of the was, under § 1177 of the code of 1880, her business, by him as her agent.

Affirmed.

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PETER McKENZIE ET AL. v. J. L. SHOWS ET AL.

1. HOMESTEAD. *Sale of trees. Joinder by wife. Code* 1880, § 1258.

Growing trees are part of the realty. Hence, a conveyance by a hu of all the merchantable timber on his homestead, with an inde time for its removal, is an incumbrance of such homestead, and v the wife does not join. So held where the sale of the timber wou duce by one-half the value of the homestead. Code 1880, § 1258; *I* v. *Miller*, 35 Miss., 700.

2. CONVEYANCE OF HOMESTEAD. *Failure of wife to join. Effect.*

A conveyance of his homestead by a husband, without his wife's jo does not pass an estate in expectancy to vest when the land ceases a homestead. It conveys no estate whatever.

FROM the chancery court of Jones county.

HON. W. T. HOUSTON, Chancellor.

One Yawn was the owner of 160 acres of land, whic occupied, with his wife, as their homestead, and, whil occupying it, he conveyed, by deed, to appellant, McKe all the timber of a designated size growing on the lan time being fixed for its removal. The deed was ackn edged and placed upon record. Afterward, Yawn and by joint deed, conveyed the land to Collins, who conv to appellee, Shows. Soon after the latter went into po sion, McKenzie entered on the land and began to cut remove timber, when he was enjoined by appellees. only question presented by the case is the effect of the veyance by Yawn of the timber growing on the home without the joinder of his wife. The court below per ated the injunction, and defendant appeals.

Section 1258, code 1880, provides that "no mortgage, of trust, or other incumbrance upon the homestead exem from execution, shall be valid or binding unless signe the wife of the owner, if he is married and living wit wife."

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Opinion of the court.

R. H. Thompson, for appellant.

1. Yawn, the husband, owned the homestead. His wife had only a veto power on conveyances by him. He could sell against her wishes, if an abandonment were contemplated and takes place. If the decree in this case is correct, a husband cannot control his own. He could not sell fire-wood, stone, gravel, sand or growing crops from the homestead, or clear the land for cultivation. Such is not the law. He may even lease homestead lands if the lease does not interrupt or interfere with their use and occupancy as a homestead. Thompson on Homesteads & Exemptions, § 471; Smythe on Exemptions, § 303; 38 Iowa, 182; 63 Tex., 586; 81 *Ib.*, 317; 32 N. W. Rep., 315; 39 Iowa, 101. He may dedicate a part of the homestead to the public for a street, the homestead not being impaired. 52 Ill., 78; 22 Cal., 484. He may grant license to remove minerals. 39 Iowa, 101.

2. The deed by the husband is good to vest an interest in reversion, expectant on the termination of the homestead estate. 1 Lea, 543; 2 *Ib.*, 237; 14 Cal., 472; 16 Cal., 213; 16 Tex., 56; 36 Ill., 243; 30 Vt., 678; 46 Wis., 677. The homestead has terminated, and appellant's interest at once vested. The wife is not complaining. See 58 Tex., 79.

Shannon & Hardy, for appellees.

Growing trees are part of the realty. *Harrell* v. *Miller*, 35 Miss., 70; 2 Bouvier's Law Dict., 608; 2 Black. Com., 281. It was necessary, therefore, for the wife to join in the deed. Code 1880, § 1258. There is a difference between growing crops and growing timber. A sale of the latter is an incumbrance on the land, especially where there is no time for removal of the timber. 5 Am. St. Rep., 570; 1 Greenleaf on Ev., § 242; 10 Ad. & El., 753.

WOODS, J., delivered the opinion of the court.

In this state, for more than thirty years, and since the opinion of this court in *Harrell* v. *Miller*, 35 Miss., 700, it

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has been settled law that trees growing upon land are p
and parcel of the realty; that "the term *land* embraces,
only the soil, but its *natural products* growing upon a
affixed to it."

Was the sale of all the merchantable timber, of certain
mensions, on the entire homestead, with an indefinite ti
for its removal, a conveyance of an interest in the land,
an incumbrance upon it, and invalid, and of no force, beca
of the failure of the wife to join in the deed? The grow
trees are a part of the realty, and may be, in case the la
are what are denominated timber-lands in contradistinct
to other lands called agricultural lands, a very valuable p
of the realty. In a readily supposable case, the sale and
moval of the entire forest growth would practically dest
the value of the realty. In the case at bar it is alleged
the bill, and not denied in the answer, that the lands in qu
tion would be only worth about one-half as much as they a
if the timber should be taken off.

Under our own decision referred to, the sale of the gro
ing timber is a sale of a part and parcel of the land its
It is a conveyance of an interest in the land—in the pres
case, an important interest. By all authorities, it is an
cumbrance upon the homestead. Says Cooley, J., in *Post*
Campau, 42 Mich., 90, "any thing is an incumbrance wh
constitutes a burden upon the title," citing a number of
stances, and, continuing, "they permanently reduce the va
of the title conveyed." In *Prescott* v. *Trueman*, 4 Mass., 6
Parsons, C. J., employs this language: "We are of opin
that every right to or interest in the land granted, to
diminution of the value of the land, but consistent with
passing of the fee of it by the conveyance, must be deem
in law an incumbrance." In *Cathcart* v. *Bowman*, 5 Pe
St., 317, it is held that the conveyance by deed of the tim
on land, with the privilege of cutting it during a cert
term, was an incumbrance of the land, and violated the c
enant of warranty in a subsequent deed of the land itself

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rd person. The like doctrine has long prevailed in New
k and Pennsylvania.

ut it is useless to multiply authorities. The question
ot be regarded as unsettled in our courts, if *Harrell* v.
r is followed to its logical conclusion. The growing
are part and parcel of the land, by that case, and the
of such trees, and especially the wholesale conveyance
n in the case at bar, with the large diminution in value
he homestead, is clearly and inevitably the sale of an in-
t in the land, and constitutes an incumbrance upon it.
here is no estate in reversion expectant upon which the
llants can enter upon the proper sale of the homestead
he husband and wife jointly, for the reason that the at-
pted conveyance and incumbrance of the husband alone,
he sale by deed of the timber, was absolutely invalid to
ey any right or title. Collins, the purchaser of the tim-
acquired nothing by the invalid conveyance from the
and alone.

e are not inclined to eat away a wise and most beneficent
ute, designed for the welfare and support and comfort of
s and children, by engrafting any exceptions upon it.
law must be upheld and enforced as written, and this we
y declaring Yawn's deed to the timber on the homestead
ncumbrance upon the title, and invalid for any purpose.

Affirmed.

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D. W. WILKINSON v. C. J. SEARLES.

1. SET-OFF. *Former transactions. Money recoverable on common counts.*

If the plaintiff has in his hands money which the defendant is entitled to recover by an action for money had and received, though by reason of former transactions, defendant is entitled to plead set-off.

2. SAME. *Character of debt set off. Former transactions.*

In an action for the price of a car-load of meal, defendant may assert as a set-off a claim he has against plaintiff, because of inferior quality and short weights in corn and oats formerly purchased from plaintiff and paid for.

FROM the circuit court of the first district of Hinds county.
HON. J. B. CHRISMAN, Judge.

Searles, a broker in Vicksburg, Miss., sued Wilkinson, a broker in Jackson, Miss., for $295, the price of a car-load of meal sold April 28, 1892. The defendant admitted the correctness of the claim, but pleaded, by way of offset, that plaintiff was indebted to him in the sum of $246.12, on account of former transactions between the parties. The pleas of defendant, in substance, averred that Wilkinson had, some months previously to the purchase of the meal sued for, bought of the plaintiff ten car-loads of number 2 mixed corn, at the price of fifty-two cents per bushel, aggregating $3,128.75, which amount was paid plaintiff, but that he delivered corn of a lower grade and of less value by the sum of $218.64, according to the contract price. The pleas also averred that, in the purchase by defendant from plaintiff of said corn and certain oats, there was a shortage in weight of the same, according to the contract price, amounting to $27.58. This sum, added to the $218.64, aggregated $246.12, being the difference in value between the corn and oats purchased and paid for and those actually delivered by plaintiff.

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Brief for appellant.

ndant tendered with his pleas the difference between sum of $246.12 and the sum demanded by plaintiff.

ie plaintiff demurred to these pleas, on the following nds: 1. The pleas are an attempt to set off unliquidated ages growing out of prior transactions. 2. There is no ient allegation of any set-off or cross-action. 3. The pleas are no defense.

ie demurrer was sustained. Defendant declined to plead ier, and, from a judgment in favor of plaintiff for the int demanded, prosecuted this appeal.

ame & Alexander, for appellant.

efendant was not seeking to enforce a claim for unliqui- l damages, but an *account* upon which he could have in *indebitatus assumpsit*. The statute provides that the ndant may "plead and set off against the demand of the tiff any *debt or demand* which he may have against the tiff." Code 1880, § 1551. This is broad language. The and of the defendant consists of two items: (1) A claim use of the purchase of corn of a certain grade, whereas, corn that was delivered was of a lower grade and less . (2) Because of the purchase of a certain quantity of and oats, whereas, a *less quantity* was delivered. The and arises *ex contractu*, and is easily capable of being e certain. The right of set-off has been greatly enlarged r our statutes from time to time. *Ashby* v. *Carr*, 40 ., 64; *Casper* v. *Thigpen*, 48 *Ib.*, 635; *Hunt* v. *Shackel-* 55 *Ib.*, 94.

Cobb v. *Lees*, 60 Miss., 343, this court stated the true when it said that set-off was not allowable there, because *itatus assumpsit* could not be maintained.

Pollard v. *Thomas*, 61 Miss., 150, it was properly held the beneficiary in a trust-deed, having only an equitable , could not maintain an action at law for the proceeds of roperty embraced in the deed converted by a third party. the court refers to *Ashby* v. *Carr* and *Hunt* v. *Shackelford*,

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and recognizes the contrary rule as applicable where the rig
or claim is asserted *defensively*.

The statute was intended to prevent circuity of action a
expense, and wisely contemplated the settlement in one s
of the entire controversy between parties in a case like th

In addition to the authorities cited above, we refer to t
following: *Austin* v. *Rawdon*, 44 N. Y., 63; *Vilmar* v. *Sch*
61 *Ib.*, 564; *Smith* v. *McCarthy*, 39 Kan., 308; 82 Pa., 128;
Minn., 319; *Becker* v. *Northway*, 20 Am. St. R., 543; 12 A
Dec., 155, and cases cited in note. See especially *Eads*
Murphy, 52 Ala., 520.

Calhoon & Green, for appellee.

The pleas set up unliquidated damages arising from pri
transactions. The damages resulting from a breach of co
tract are unliquidated when there is no criterion furnish
for their ascertainment. Waterman on Set-off, § 301. S
same authority, § 298. Defendant's unsettled account co
sists of a claim not only unliquidated but wholly uncerta
Ib., § 300. See also cases cited in notes, §§ 333, 361.

Loss of goods cannot consist of set-off. *Ib.*, § 326.

Nor can damages in action for deceit for sale. *Ib.*, §§ 3
303, 312, 328.

In our state, unliquidated damages cannot be set off. *Wh*
aker v. *Robinson*, 8 Smed. & M., 349; 48 Miss., 639; *Burr*
v. *Gordon*, 57 *Ib.*, 93; *Cobb* v. *Lees*, 60 Miss., 343. An a
count composed of items of damages for inferior grain a
loss in weight, without any standard by law or contract
ascertain the amount, and which can only be arrived at
evidence *pro* and *con*, cannot be made the basis of a set-o

Argued orally by *L. Brame*, for appellant, and *M. Gre*
for appellee.

CAMPBELL, C. J., delivered the opinion of the court.

The demurrer should have been overruled. The substa

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Statement of the case.

of the fourth, fifth and sixth pleas is that the plaintiff has in his hands, by reason of former transactions set forth in the pleas with needless particularity, money which the defendant is entitled to recover, by an action for money had and received; and, whatever may be true elsewhere, under our statute this is a valid set-off. There is nothing in any of the cases from our reports cited by counsel inconsistent with this view. On the contrary, they sustain it.

Reversed, demurrer to the fourth, fifth and sixth pleas overruled, and cause remanded for further proceedings in the circuit court.

GEORGE V. BOSWELL *v.* THE STATE.

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LIQUORS, SALE OF. *Beer. Privilege tax. Local option. Laws* 1886, *p.* 35.

As repeals by implication are not favored, the local option act of 1886 (Laws, p. 35) did not abrogate the law previously existing, by which persons could deal in malt liquors by simply paying a privilege tax. Therefore, where said law was put in force in any county by an election, one who had paid a privilege tax to sell beer could lawfully sell it, and was not required to present a petition and obtain a license as in case of persons retailing *vinous and spirituous* liquors.

FROM the circuit court of the first district of Yalobusha county.

HON. EUGENE JOHNSON, Judge.

On November 14, 1892, appellant was indicted for selling "alcoholic, malt and intoxicating liquors in less quantities than one gallon, without having first obtained a license so to do, as required by law." On the trial the testimony showed that on November 7 he sold "beer." The district attorney stated to the court that "he relied on the act of the legislature of March 11, 1886, commonly called the local option act,

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Brief for appellant.

and that he relied for conviction of defendant on the ground that he did not have a license to sell beer according to the requirements of said act."

It seems that an election was held in the county, in 1886, under said local option law of March 11, 1886, but the record does not disclose how this election resulted. The court, however, in accordance with § 1623 of the code of 1892, probably took judicial notice of the fact, which does not appear in the record, that there was such an election, and that it resulted for the sale. The indictment does not, in any way, refer to the fact of an election.

The defendant introduced certain portions of the record of the board of supervisors relating to the election, in the effort to show that the same was invalid, but, as the court does not pass upon the questions thus raised, it is not deemed necessary to make any further statement as to this.

The defendant also introduced a privilege tax license issued by the tax-collector of the county, March 1, 1892, authorizing him to "carry on the business of selling beer in said county for twelve months." He offered no petition or order, such as is required to obtain a license for retailing intoxicating liquors. Defendant's evidence above referred to was excluded, and from a judgment of conviction he prosecutes this appeal.

R. H. Golladay, for appellant.

A conviction under the local option act of 1886 cannot be sustained on an indictment like this, containing no averment of an election under that act. *Norton* v. *State*, 65 Miss., 297; *Bryant* v. *State*, *Ib.*, 435. Besides, as the offense was committed after the adoption of the dram-shop chapter in the code of 1892, the local option act was defunct. The entire legislation on this subject was revised. See code 1892, §§ 5, 1623. The offense, if any, was committed long after the adoption of the dram-shop chapter; but defendant was not amenable under that, as was conceded in the lower court,

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because he was acting under a privilege tax license issued to him prior to the adoption of said chapter. By the last clause of § 1623 of the code it is provided that the chapter shall not affect any license in force at the time of its adoption.

Frank Johnston, attorney-general, for the state.

The county had held an election under the act of March 11, 1886, § 6, and that act was in force. It abrogated the provisions of the code of 1880 as to that county. It was necessary to apply for a license to sell any intoxicating liquors, including beer, under said § 6 of the act. This was not done. Appellant had only paid a privilege tax March 1, 1892, for selling beer. The court below knew judicially that there had been an election in the county under the act of 1886. Code 1892, § 1621. The act of 1886 having been put into operation, the appellant had not obtained a valid license to sell beer, because he had not complied with the act. He had no license which was protected by § 1623, code 1892.

Argued orally by *R. H. Golladay*, for appellant, and *Frank Johnston*, attorney-general, for appellee.

CAMPBELL, C. J., delivered the opinion of the court.

If the election held in Yalobusha county was a valid one, as it resulted "*for the sale*," its effect was to put in operation there the act of March 11, 1886, as to obtaining license. But, as repeals by implication are not favored, it is not to be assumed that the act designed to abrogate the law before existing further than to substitute twenty-five real estate owners as petitioners for license for those required before; and it was not the purpose of the law to repeal the privilege tax law as to the sale of malt liquors under authority of a privilege tax license under the code of 1880 and amendments. License to sell vinous and spirituous liquors was obtainable according to § 6 of the act of March 11, 1886, but

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Statement of the case.

dealers in "*ale, beer or other malt liquors*" might still obtain license as before. A plain distinction was made in the legislation of this state prior to 1886 between vinous and spirituous liquors and malt liquors. Dealing in malt liquors by one not licensed to retail vinous and spirituous liquors was made a source of revenue, and authorized on paying the prescribed tax and obtaining license as provided for by the revenue law. The act approved March 18, 1886, entitled "*An act to amend* §§ 557 *and* 585, *code of* 1880, *so as to increase the public revenue*," etc., expressly makes the distinction mentioned (Laws, p. 17), and contemplates the sale of malt liquors under a privilege tax license without a license to retail vinous and spirituous liquors.

In view of all this, our conclusion is, that the operation of § 6 of the act of March 11, 1886, is to be restricted so as to embrace only cases where the law before required license to be obtained from the board of supervisors or municipal authorities. The appellant had license to sell beer, and was protected by it.

Reversed and remanded.

PETER JONES v. THE STATE.

APPEAL TO CIRCUIT COURT. *Vagrancy. Justice of the peace. Code* 1892, § 1323.

One charged with vagrancy and required by a justice of the peace to give bond for good behavior or be committed to jail, under § 1323, code 1892, may appeal to the circuit court.

FROM the circuit court of Warren county.

HON. J. D. GILLAND, Judge.

On November 21, 1892, Hettie Jones made affidavit before a justice of the peace of Warren county that appellant, Peter Jones, was a vagrant, having abandoned his wife and children

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Brief for appellant.

without just cause, leaving them without support, and in danger of becoming a public charge. On the same day the justice of the peace entered a judgment reciting a hearing on all the evidence in the case, and adjudging that the defendant enter into a bond in the penalty of $200 "for his good behavior for twelve months and treatment of his wife, and to be committed to the county jail ten days, unless he immediately give bond and pay all costs."

It seems that defendant took an appeal to the circuit court, but the record contains no petition or bond for appeal. It recites that the circuit court, on motion of the district attorney, made a motion to dismiss the appeal for want of jurisdiction, and that the court, being of opinion that no appeal could be prosecuted from the judgment of the justice court in vagrancy proceedings for the first offense, sustained the motion and dismissed the appeal. To this ruling an exception was taken, and the defendant appealed.

Section 1323, code 1892, provides for the arrest of one suspected of being a vagrant, and, on satisfactory evidence, the justice of the peace before whom he is to be taken is required to commit him to jail for ten days, unless he shall give bond in the sum of $250, conditioned for his good behavior for twelve months. Section 1324 makes it the duty of the justice of the peace, on subsequent violation of the law in relation to vagrants by such person, to re-arrest and try the offender, who, on violation, is to be committed to jail for twenty days. Bond is not allowed for the second offense.

McLaurin & McLaurin, for appellant.

Section 82, code 1892, provides for appeals from the justice court in all civil cases, and § 86 provides for appeals in criminal cases. Clearly the defendant had the right to appeal to the circuit court. We need not cite authorities in support of this right, for the statute is explicit. If the legislature had intended to deny an appeal in vagrancy cases, it would have said so. What difference there could be between the

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first and second offense, so far as the right to appeal is c
cerned, we cannot see.

Frank Johnston, attorney-general, for the state.

1. Counsel for appellant relies upon the provisions of §
code 1892, as giving the right to appeal, but the case invol
the construction of this section, together with §§ 1323, 13
Section 1323 of the code must have been treated as prov
ing not so much for a conviction of the criminal offense
for the bond for good behavior, and the imprisonment fe
ure, not as a punishment but as the means of enforcing co
pliance with the requirement for the bond. Section 13
relating to the second offense, provides unconditionally
punishment by imprisonment. From this, the construct
arises that in such case an appeal lies under the general te
of § 86.

The case seems to bear an analogy to, if it is not id
tically the case of, one being put under a peace-bond un
§ 1479 of the code, which expressly allows an appeal, wh
in the case of this special good-behavior bond no appea
expressly provided for. In the enactment of § 1479 it m
have been considered that appeals from judgments requir
peace-bonds were not given by the general law, § 86,
hence the necessity of a special provision as to an app
Under § 1324 there would be a technical conviction, fr
which an appeal could be prosecuted.

The question is *res nova*, and upon these suggestions i
respectfully submitted to the judgment of the court.

2. The appeal to the circuit court was imperfect in t
that the record shows no appeal-bond from the judgmen
the justice court. Section 86 of the code requires an app
bond, and § 88 requires that it shall be filed in the cir
court.

CAMPBELL, C. J., delivered the opinion of the court.

The appeal from the judgment of the justice of the pe

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Statement of the case.

mproperly dismissed on the ground on which the order smissal was put by the circuit court. Code of 1892, §§ 323.

Reversed and remanded.

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HARRISON JONES ET AL. v. THE STATE.

DENCE. *Dying declaration. Credit of. Circumstances.*

n a murder trial it is proper to instruct that the jury may consider all the circumstances under which a dying declaration in evidence was made, and give it such credit as the jury may think it fairly entitled to in the light of all the evidence, as in case of the testimony of a witness.

TRUCTION. *Murder. Conviction of manslaughter.*

ne tried for murder, but convicted of manslaughter only, cannot complain of a charge, warranted by the evidence, instructing the jury as to a conviction for murder.

TRUCTION. *Murder. Joint design to kill.*

n the trial of two persons for murder, an instruction that if they, or either of them, shot and killed deceased, and that before, or at the time, the shots were fired defendants had formed in their minds a premeditated design to kill deceased, and that the shots were fired in furtherance of such design, without legal excuse, they should be convicted of murder, though subject to criticism, by fair construction means the same as if the language had been "if defendants, *together or jointly*, had formed the design." *Brabston* v. *State*, 68 Miss., 208, distinguished.

OM the circuit court of the second district of Panola ty.

ON. JAMES T. FANT, Judge.

ppellants, Harrison and Grant Jones, were jointly in- d for the murder of John Phelps, and, being tried there- were convicted of manslaughter. They made a motion new trial, which was overruled. Hence this appeal.

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Brief for appellants.

There was evidence to show that the shooting betwe Harrison Jones and deceased began in a room, suddenly a unexpectedly, when Grant Jones was not present, and pr ably did not know what was going on; but that he went i the room and continued the shooting already commenced his brother. The deceased received several wounds, one which proved fatal. It was not shown, and probably co not be certainly known, which of the defendants fired fatal shot.

The opinion contains a further statement of the case.

Stone & Lowrey, for appellants,

As to the question decided by the court, made the follo ing points:

1. Defendants' instruction, which was refused, should h been given. *Nelms* v. *State*, 13 Smed. & M., 500; *Lambeth State*, 23 Miss., 322. The modified instruction, as given the court, was an attempt to break the force of the instr tion as asked. And this effort may have been successf The instruction told the jury that in determining the cre to be given the dying declaration, not only the circumstan under which it was made should be considered, but all other evidence in the case should be looked to. The ot evidence could shed no light on the declaration. It does tend to show that the declaration was made, or that the w nesses fully understood deceased when made. It relieves declaration from that intrinsic weakness which the law taches to it. Evidence in support of other facts could give additional weight to the declaration.

2. The ninth instruction given for the state is fatally er neous. *Brabston* v. *State*, 68 Miss., 208. Under this instruct it was not necessary that the defendants together had form a design to kill. If there was no conspiracy or concert of tion between the defendants, and one of them of his o mind entered the fight, and killed the deceased, how can other be guilty of murder? The evidence shows no c

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Brief for the state.

racy; on the other hand, the shooting began suddenly and xpectedly, when one of the defendants was not in the m, and did not know what was going on. Suppose one hem entered the fight under such circumstances as would ke the killing by him murder, but entered entirely upon own responsibility, and not in concert with the other de- dant. Would such other defendant be guilty of murder? der this instruction we have both appellants entering the t with the premeditated design on their respective parts take the life of deceased, and each shooting in further- e of the design, and the jury is instructed to convict if y believe that defendants, or either of them, killed de- sed. The fact that defendants were convicted of man- ughter instead of murder under this charge makes no dif- ence. The verdict was probably the result of an effort to ape the harsh and unreasonable rule announced. On this nt see *Hawthorne* v. *State*, 58 Miss., 778.

T. M. Miller, attorney-general, for the state.

. If defendants had been convicted of murder, the error he instructions complained of might be admitted; but, the verdict was manslaughter only, this instruction had prejudicial effect.

. The real question in the case is whether, on the evi- ce, either of the defendants could be convicted, it not ng known which fired the fatal shot. Grant Jones went o the room, and continued the shooting already com- nced by his brother, and the deceased was killed. At mon law, as this writer undertook to show in *Brabston* v. *te*, 68 Miss., 208, both defendants would be guilty of rder. There is nothing to prevent the application of the e of the common law in such case. Shall it be held that ther defendant can be convicted? Is it not sufficient that y *continued* to act together? It will not be necessary to rrule the *Brabston Case* to sustain this most rightful con- tion.

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Opinion of the court.

WOODS, J., delivered the opinion of the court.

The action of the trial court in refusing to instruct jury for the appellants as prayed in their charge marked 10, and in giving it in its modified form in No. 9, was error. If the charge as to the dying declaration was t given at all, the learned judge properly qualified its n legal abstractions by telling the jury that they were to l at all the circumstances under which the dying declara was made, and give it such credit as the jury might thin fairly entitled to in the light of all the evidence in the c This is the general rule for examining and weighing dence. A living witness is corroborated and supported the other evidence, perhaps, or he is refuted and discred by the other evidence, and, in both cases, the jury sh look at all the evidence to determine the weight of the timony of the particular witness. We are aware of no son why a dying declaration should not be looked at like through the medium of the concentrated light of all the idence.

The appellants are in the enviable attitude of persons off from complaint because of the court's action in gi the ninth instruction for the state. That instruction ranted the jury in bringing a verdict of guilty as cha against both defendants. The state's proof fully warra such a verdict also; yet, the jury did not convict of mur but of manslaughter only. The jury was told by the inst tion that it might convict of murder. The verdict wa manslaughter, and there is no room for complaint, at on the part of the appellants. This is sufficient answ the assignment of error on this point, but we do not ch to rest our opinion wholly upon it. The instruction is fortunately, not drawn with that exactness of verbal ex sion which leaves no ground for criticism; and yet, the principle is defined with fullness enough, and the lang employed in the definition is perspicuous enough to leav doubt as to what was really meant.

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Opinion of the court.

The instruction, in its concluding part, to which objection taken, is: "If you believe from the evidence, beyond a sonable doubt, that the defendants, or either of them, niously shot and killed the deceased as charged in the ictment, and that, before or at the time the shots were d, the defendants had formed in their minds a premed-ted design to take the life of the deceased, and that the ts were fired in furtherance of such design, and without tifiable cause or legal excuse, then you should find them lty of murder." The meaning would be free from all sconception if the charge had said: "If the defendants ether," or "the defendants jointly," or "the defendants tedly," had formed in their minds a design to take the life the deceased, etc. But, by any fair construction, this st be held to be the meaning of the charge as it appears the record. It was one design formed by the defendants both of the defendants—in their minds, not in the mind each separately and without connection or agreement h the other. It was a common design formed by the men, and not the independent resolution of individuals, ing alone and without agreement. It was the same de-n formed by both, not by each for himself, and in the nds of both, and not in the mind of each as an independ-purpose.

Viewed in this light, it is not at all in conflict with the nion of this court in the case of *Brabston* v. *State*, 68 ss. The cases are widely different in their facts, and the tructions condemned by us in that case bear no real resem-nce to the instruction which we are asked to repudiate in case at bar. Neither on the law nor the facts are the cases to be confounded by the legal mind.

All other assignments are so clearly non-maintainable that decline to do more than say we find no error in the ord.

Affirmed.

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Statement of the case.

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J. J. CLAY *v.* POSTAL TELEGRAPH-CABLE CO.

1. MASTER AND SERVANT. *Trespass. Cutting trees. Telegraph Co.*

A telegraph company is liable, if its laborers, clearing its right of w cut trees on adjoining land of another, although done contrary to positive orders of the superintendent, if it resulted from the negligen of the latter in absenting himself, and intrusting the work to ordina laborers, without supervision.

2. CUTTING TREES. *Liability. When size immaterial. Instruction.*

The telegraph company so trespassing, will be liable as for cutting tre although the evidence shows that those cut were small, in no case ceeding six or eight inches in diameter; and it is error, in instructio to allude to them as shrubs or undergrowth.

3. PUBLIC HIGHWAYS. *Width. Right of way. Telegraph line.*

Public roads are required to be opened and worked to a width of at le ten and not more than thirty feet. A telegraph company, given right of way for its line along such a road, is not justified in assum that there is a uniform legal width of thirty feet, and that it has right to cut trees anywhere within fifteen feet of the center. It must governed by the actual width of the road.

4. HIGHWAYS. *Jurisdiction of supervisors. Right of way. Telegraph line.*

Boards of supervisors cannot grant to a telegraph company a right of along the *margin* of a highway. It can confer no right outside the l its of the highway itself.

FROM the circuit court of the first district of Hinds coun HON. J. B. CHRISMAN, Judge.

The appellee, the Postal Telegraph-Cable Co., construct its line of telegraph across the state of Mississippi, followi the public highways. Before entering the county of Hin in December, 1890, it obtained an order of the board of sup visors granting it the right to erect its poles and construct line along the public highways in said county, and, whene necessary, "to cut, trim and remove any trees, limbs or ot

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Statement of the case.

obstructions in the way of same, upon the margin or within the width of said highways." The work of clearing the right of way thus secured, and of erecting the poles and stringing the wires, was done by a force of laborers under the superintendence of one Fisher. It was shown that Fisher had been instructed and cautioned not to invade private property, or to cut or trim any timber or growth of any kind on lands adjoining the granted right of way, without permission of the owners, and this order had been communicated by Fisher to the laborers employed by him.

While the laborers were engaged in clearing the route and stringing the wires along the public highway from Jackson to Clinton, they cut down many small trees on land of the plaintiff, Clay, which bordered the road. There was considerable conflict in the evidence as to the character and size of the trees cut, the witnesses for the defendant testifying that they were so small as to be nothing more than bushes or shrubs, while witnesses for the plaintiff testified that some of them were six or eight inches in diameter, large enough for posts, rails or fire-wood. The trees so cut were not within the actual roadway as laid out and used, but were growing along the roadside, some of them being within fifteen feet of the center of the road, which was of varying width.

On the day in question the superintendent, Fisher, was not with the laborers, but had remained in Jackson to superintend the removal of the camp and outfit to Clinton by rail, and the gang of laborers, numbering twenty-five or thirty, were sent on by him to prepare the route and construct the line to Clinton. He appointed no one to act in his absence as superintendent or foreman, but had generally, when absent, intrusted to one of the more intelligent of the laborers the duty of seeing owners of lands as their places were reached, and getting permission to enter and cut trees.

This action was brought by Clay against the Postal Telegraph-Cable Co. to recover $1,725, the penalty given by § 961, code 1880, for the unlawful cutting of said trees, being $15

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Brief for appellant.

each for oaks, and $5 each for all others alleged to have be cut on plaintiff's land.

On the trial, the court granted, among others, the follo ing instructions for defendant:

"2. The court instructs the jury for the defendant, tha they believe from the evidence that the trespass complain of by the plaintiff was committed by the laborers in the se ice of defendant while under the supervision of its age Peter Fisher, without the knowledge of said Fisher, a against his positive instructions to them not to cut any tre limbs or brush along the line or upon the margin of a highway while erecting their telegraph line, and, in his n essary absence, without first obtaining the consent of t abutting property-owners, then they will find for the defe ant."

"4. If the jury believe from the evidence that the defe ant, at the time of the commission of the trespass complain of in plaintiff's declaration, was constructing its telegra line along the public highway leading from Jackson to Cl ton, by authority of the board of supervisors, and, pursu to said authority, cut down trees, shrubs, undergrowth saplings which were upon the line or within fifteen feet fr the center of said road, then they will find for the defenda

"5. If the jury believe from the evidence that the tresp complained of by the plaintiff was not the cutting down trees growing on his land, but of shrubs or undergrow growing upon the margin of the public highway, alo which defendant was at the time constructing its telegra line, even though they may believe from the evidence t such cutting was done upon the lands of plaintiff, they m find for the defendant."

There was a verdict for defendant. Judgment according and, after motion for new trial overruled, plaintiff appeal

E. E. Baldwin, for appellant.

It was negligence for Fisher to absent himself, and le

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the laborers to cut out the line. He had neglected to see the owners of the adjoining lands, and trusted this to one of the laborers. This case is not controlled by *Fairchild* v. *R. R. Co.*, 60 Miss., 931. The second instruction should not have been given.

The order of the board of supervisors was void. It could confer no right outside the line of the highway. Elliott, Roads and Streets, 161. The fifth instruction is erroneous in characterizing the growth as shrubs and undergrowth. The statute does not apply alone to the cutting of full grown trees. Besides, some of those cut were six or eight inches in diameter. This instruction practically amounted to a charge for the defendant.

J. R. McIntosh, for appellee.

This case is clearly within the rule laid down in *Fairchild* v. *R. R. Co.*, 60 Miss., 931. The theory of that case is, that the company is not liable for a trespass committed by its servants and laborers not its agents. The second instruction was therefore correct.

The third instruction is unobjectionable. It plainly limited the right of defendant to cut trees to fifteen feet on either side of the center of the road.

Clearly the fifth instruction is correct. If no trees were cut, but only shrubs and undergrowth, defendant is not liable. There were witnesses who testified that no trees, but only bushes, were cut. Defendant was entitled to an instruction based on that view of the evidence.

Argued orally by *E. E. Baldwin*, for appellant.

WOODS, J., delivered the opinion of the court.

The second instruction for defendant is defective in omitting any statement of the rule of law applicable if the jury should believe the trespass complained of resulted from the negligence of Fisher, the agent of the corporation in the

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construction of its line. If Fisher was negligent in sendi out a large number of ordinary laborers to clear out way, and erect its line, over a highway ten miles in leng even though he had instructed these laborers not to inv private property, the company was liable for the injury flo ing from its agent's negligence. The proper inquiry w not whether Fisher was absent superintending the remo of his camp from Jackson to Clinton, but was the send out of a gang of irresponsible laborers, without any inte gent and controlling head, with no agent of the company perform Fisher's duty of supervising the work, under evidence in the case, negligence on Fisher's part, and imp able to his principal? It could not be contended that Fis might have absolved his principal from all liability for t passes done by a gang of ordinary laborers along or nea the highways in the state, beginning at the Alabama st line and ending at the Mississippi river, by simply absent himself during the entire progress of the work, on thought that his presence was necessary at his camp. negligence in the case supposed would not be disput Whether Fisher's absence for the entire day on which injury is alleged to have been committed, with the excuse offered for it, disclosed his negligence, should have been p sented to the jury by a proper qualification of, or addition the second charge of appellee.

The fourth instruction given for appellee is wrong, in t it assumes the width of the road along the entire front appellant's land to be thirty feet. Public roads in this st may be only ten feet wide, and they cannot exceed thi feet. The testimony of the witnesses as to the width of road is unsatisfactory and conflicting, but no witness und took to say the uniform width was thirty feet. If it was than that, the company had no right to cut any timber wit fifteen feet from the center of the road.

The fifth instruction given for appellee is clearly erroneo and was tantamount to a peremptory charge for the telegr

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company. The case was permitted to be tried upon the assumption that young trees were not trees, but shrubs, undergrowth, bushes. The mind of the jury was diverted from the real issue by having itself directed to the cutting of what the instruction denominates shrubs or undergrowth. The evidence does not so much as hint at the cutting of a single shrub. Nor is there any support for the contention that the destruction was of undergrowth. A shrub is a low, small plant, whose branches grow directly from the earth, without any supporting trunk or stem. A tree is a woody plant, whose branches spring from and are supported upon a trunk or body—and the tree may be young or old, small or great. Undergrowth is a term applicable to plants growing under or below other greater plants. To permit the jury to find—nay, to instruct the jury that it might find—that about one hundred and fifty young trees, of varying heights and thicknesses, were shrubs and undergrowth, was fatally erroneous. Every tree on or near the appellant's entire front of a quarter or half mile was cut down, and yet, the jury is told that, if only shrubs and undergrowth were destroyed, the verdict must be for the telegraph company.

The telegraph company cannot successfully shelter a trespass under an order of a board of supervisors, which assumes to confer the right to cut timber on the lands of private persons which lie along the "margin" of the highway. The board of supervisors can confer no right to do any thing outside the limits of the highway itself, and any grant, or attempted grant, in or to the lands on the "margin"—the border, the side—of the road is utterly nugatory.

Reversed.

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Statement of the case.

SOLOMON HYMAN ET AL. v. CHARLOTTE ROLLINS, ADM'X.

1. SET-OFF. *Suit against administrator. Estate. Application of assets.*

In an action at law against an administratrix on notes executed by the intestate (her husband), where the defendant proves the delivery to plaintiffs of cotton raised by deceased sufficient to pay the notes, plaintiffs cannot meet this by proof that they had an unprobated account against deceased, the amount not stated, and also an account against his widow and children contracted after his death, and that by consent of the widow and children (one of whom was a minor) the cotton had been received in settlement of these accounts, leaving the notes unpaid.

2. SAME. *Right of infant distributee. Power of court of law.*

Whatever the right of plaintiffs against the widow and adult distributees, or what would have been the result if plaintiffs had offered to show that they had received the cotton in satisfaction of a valid debt against the *estate*, is not decided. Because of the interest of the infant in the estate, which cannot be protected in such a case in a court of law, the agreement to apply the cotton belonging to it to a debt due by the widow and adult distributees, leaving the notes a charge on the estate, cannot be enforced.

FROM the circuit court of Lincoln county.

HON. J. B. CHRISMAN, Judge.

Appellants, Hyman Bros., brought suit in the court below against appellee, Charlotte Rollins, administratrix of the estate of Peter Rollins, her deceased husband, to enforce payment of two promissory notes executed by the deceased, one dated August 25, 1888, and the other January 18, 1889. Defendant pleaded the general issue, relying on the statute authorizing her in her representative capacity to make any defense thereunder. On the trial, May 9, 1892, plaintiffs introduced in evidence the two notes, which had been duly probated, and rested.

Thereupon, the defendant, in the language of the bill of exceptions, "introduced several witnesses whose evidence showed that Peter Rollins, the defendant's intestate, died

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Brief for appellants.

gust 9, 1889, and that after his death, on the 18th of May, 1, letters of administration were granted defendant on his ate; that before letters of administration were granted de- dant on the estate, the defendant, Charlotte Rollins, the ow of the decedent, and John Rollins, his son, delivered he plaintiffs cotton of the crop of 1889, raised on the farm said Peter Rollins, and by him grown before he died, ely more than sufficient in value to satisfy and pay the es sued upon, and that at the time of the delivery they ected plaintiffs to appropriate the cotton to the payment the debt due them from Peter Rollins, deceased." De- dant then rested.

Plaintiffs, in rebuttal, offered to show that Peter Rollins, he time of his death, was indebted to them on account supplies advanced for the year 1889 to make a crop, and t the cotton received by them was appropriated in satis- ion of this account, and of a debt contracted by the low and children of the deceased after his death; that h appropriation was made by consent of the widow and ldren, one of whom was a minor; that the cotton was y sufficient in value to liquidate said indebtedness; that s was done to avoid the necessity of taking out letters of ministration upon the estate; that plaintiffs were the only ditors of said Peter Rollins, who owed no debts except l account and the notes in suit. The said account had er been probated, and the twelve months within which ditors were allowed to probate claims, had not expired the time of the trial. Defendant objected to this re- tal testimony offered by plaintiffs, and the same was luded. To this action of the court plaintiffs excepted. lgment for defendant. Plaintiffs appeal. The opinion tains a further statement of the case.

H. Cossedy, for appellants.

On behalf of defendant it was urged below that, because re had been no administration on the estate, and because

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Brief for appellee.

the open account for supplies had not been probated at the time the cotton was appropriated to its payment, the settlement was not binding on the administratrix, who was one of the parties consenting to it. The law interposes no obstacle to the amicable settlement of a decedent's estate by the only parties interested in it—heirs and creditors. Such a settlement was proposed to be shown by the evidence which was excluded. Sections 2027, 2028, code 1880, have no application to the state of case presented. The entire estate descended to the heirs, subject only to the claims of creditors, and the heirs could make such disposition of it as they saw fit. In this case no one but appellants, the only creditors, had a right to object to the settlement, and they did not object, but insist on carrying it out. There is no merit whatever in the objection raised by defendant.

R. H. Thompson, for appellee.

1. Plaintiffs were incompetent, as witnesses, to establish their own claim against the estate. Since it does not appear by whom they proceeded to make the rebuttal proof, the objection was good because of their incompetency.

2. Plaintiffs did not propose to show the amount of the alleged unprobated account, or the amount of the alleged debt contracted by the widow and children of Rollins after his death. So, unless plaintiffs had the right to appropriate the cotton to either or both, the testimony offered was not sufficient to constitute a defense. Cotton more than sufficient to pay the notes sued on had been traced into their hands.

3. The offer to show that plaintiffs were the only creditors was a mere opinion, since the time of probating claims had not expired.

4. The cotton received by plaintiffs was the property of the estate of decedent. The delivery of the same by the widow and children, one of whom was a minor, constituted plaintiffs bailees of the property, but did not pay the debt

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due from the decedent. No one was at that time competent to bind the estate as to its price.

COOPER, J., delivered the opinion of the court.

Whatever may have been, or may be yet, the right of the plaintiffs against Charlotte Rollins and the adult distributees of Peter Rollins, deceased, growing out of the transaction sought to be proved by the plaintiffs, it cannot be enforced in this action.

The appropriation of the proceeds of the cotton delivered to the plaintiffs to the open account due by the intestate, and to an account due by the widow and distributees, was made under an agreement with them as distributees. The present suit is against the representative of Peter Rollins. In that estate an infant is equally interested with each of the adults, who were parties to the negotiation with the plaintiffs. The rights of this infant could not be separated from those of the other distributees, and protected by the judgment of a court of law. Satisfaction of any judgment rendered against the administratrix would be made by sale of the property of the intestate, to the prejudice not only of the adult distributees, who are not parties to the suit, but also to that of the infant, who is not a party to the suit, and had no connection with the transaction sought to be proved. If the plaintiffs had offered to prove the existence of another valid debt of the intestate of any precise or named amount, to the satisfaction of which the proceeds of the cotton had been applied, a different question would have been presented. But this they did not propose to do. Whether the open account due by the intestate, proposed to be proved by the plaintiffs, was one dollar or five dollars or five hundred dollars, is not suggested. The plaintiffs made a *prima facie* case by introducing the notes sued on. The defendant then proved that she had delivered to the plaintiffs cotton belonging to her intestate of greater value than the sum due on the notes. The plaintiffs then

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proposed to prove that the deceased, at his death, owed them another sum on open account, and afterwards the widow and adult distributees contracted a debt to plaintiffs, and that the sum of the open account due by the intestate, and the debt contracted by the widow and children, exceeded the value of the cotton. This may be true, and yet no right to recover on the notes sued on may have existed. For the value of the cotton exceeded the sum due on the notes, and, for aught that appears, or was offered to be proved, the amount due by the intestate on open account was not greater than the excess of the value of the cotton over the sum due on the notes, in which event, both account and notes would be paid. The agreement to apply the cotton to the account of the widow and adult distributees, leaving the notes a charge on the estate, was invalid and not enforceable against the representative of the estate.

Affirmed.

YAZOO DELTA INVESTMENT CO. v. J. A. SUDDOTH, CLERK, ETC.

1. ASSESSMENT. *Approval of roll. Coahoma county. Laws* 1892, *p.* 362.

At a meeting of the board of supervisors of Coahoma county, in the first district thereof, for the purpose of equalizing assessments, an order was made assuming to change the valuation of certain lands situated in the second district, and the clerk made the changes on the roll as directed. *Held*, that this was unauthorized and void; but, as the board, at its next meeting in the second district, accepted and approved the roll as altered, the approval was good.

2. SAME. *Changes noted on roll. Approval. Code* 1892, § 3793.

In equalizing assessments, all changes made by the board of supervisors must be noted on the roll itself, for, when completed, it is the warrant under which the collector acts. It is not necessary for the minutes of the board to show each specific change made. After all corrections are made on the roll, it is to be approved by a general order. Code 1892, § 3793.

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Brief for appellant.

ESSMENT. *Conclusive effect. Failure to appeal. Code* 1892, §§ 80, 3793.

AX-payers failing to appeal from an order of the board of supervisors approving an assessment are concluded thereby. Code 1892, §§ 80, 3793.

OM the circuit court of the second district of Coahoma ty.

N. R. W. WILLIAMSON, Judge.

e opinion states the case.

ok & Anderson and *Cutrer & Cutrer*, for appellant.

e sole purpose which actuated the legislature in passing ct dividing Coahoma county into two judicial districts o afford the people residing in each of the subdivisions er convenience and less expense in transacting public ess. Keeping this purpose in view, there can be no ulty in arriving at a proper construction of the act. Its ose must be made effective, or the main thing which ght about the enactment of the law, especially this sec- elating to assessments, will be defeated. A statute can- e abrogated by a strained construction of its plain lan- e. *Bonds* v. *Greer*, 56 Miss., 710; *Railroad Co.* v. *Greg-* 8 Am. Dec., 589, and note.

ide from the proper construction of the act, which re- d that the rolls for the second district should be exam- at Clarksdale, and not at Friar's Point, we submit that rder of the board made at the latter place was not broad gh to effect any change of the roll. The board cannot xcept by the orders entered on its minutes. Code 1892, ; *Clayton* v. *Mc Williams*, 49 Miss., 311; *Bridges* v. *Clay ty*, 58 *Ib.*, 817. Every action taken on any subject must idenced by the entries on the minutes. *Crump* v. *Super-* , 52 Miss., 107.

e order must point out what changes are made in the ither specifically or by the employment of such lan- e as will enable any person to ascertain from the min- he action taken by the board. No other rule would be

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Brief for appellee.

practicable. The clerk may understand the intended act of the board one way, and the members or individuals other.

It is manifest that the order at Friar's Point does not ef any change in the roll as filed by the assessor. It does in any manner identify the alterations which it is clain the board intended to make, nor the effect of the alle changes.

The utmost effect of the board's action, both at Clarksd and at Friar's Point, was the approval of the rolls as filed the assessor. On this point, see *Lacey* v. *Davis*, 66 Am. D 524. We insist that the proper place to take action on roll for the second district was at Clarksdale, and, that be true, the order certainly approves the roll filed by the sessor.

All allegations of fact, and admissions of the board c side the record, are merely surplusage, and present no iss See *Phelan* v. *San Francisco*, 6 Cal., 531. Section 3794, c 1892, positively requires an order of approval entered on minutes, or the roll filed by the assessor will be approved operation of law. The manifest purpose of the statute i regard each roll as distinct, on which action is to be tal separately, just as if there were two counties. The demu should have been sustained.

But, if the legislative will, plainly expressed as to the districts, must be defeated, still the demurrer of the ap lants was well taken, for no authority is shown in the cl to alter the assessment rolls filed by the assessor. The act of the board had no effect other than the approval of roll without change.

Mayes & Harris, on the same side.

Yerger & Yerger, for appellee.

1. Even if we admit that the action taken by the boar Friar's Point on the roll for the second district was ille

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yet the subsequent action at Clarksdale operated as an approval of the corrected roll, and not of the roll as originally filed by the assessor. The board had before it the roll as corrected, and the action was taken on this roll.

2. It was not necessary that entries should be made on the minutes of the board to identify all the corrections. The statute requires the board to meet and hear objections and make corrections, and to approve the roll. It is contemplated that this should be done by a general order. Code 1892, §§ 3792, 3794. The case of *Lacey* v. *Davis*, 66 Am. Dec., 524, is not applicable, as the statute there construed was materially different from ours, in that it required the order to be entered on the journal.

The judgment should be affirmed.

Argued orally by *E. Mayes*, for appellant.

COOPER, J., delivered the opinion of the court.

By an act approved February 19, 1892 (Laws of 1892, page 362), the county of Coahoma was divided into two districts, the court-house for the first district being fixed at Friar's Point, and that for the second at Clarksdale. By the eleventh section of this act the board of supervisors was required to hold its meetings alternately at Friar's Point and Clarksdale, holding the first meeting at Friar's Point. The twelfth section of the act has relation to the making and return of the assessment-rolls by the assessor, and action thereon by the board of supervisors, and is as follows:

"It shall be the duty of the assessor of Coahoma county to file with the clerk of the chancery court of said county two copies each of the land and personal assessment-rolls of said county, filing one of each with the said clerk at his office at Friar's Point, and one of each at his office at Clarksdale; and said board of supervisors, in passing on said assessment-rolls, shall, at the proper meeting held by them at Friar's Point, approve so much of the same as shall relate

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to and embrace property included and being in the first district of the county; and, at the proper meeting held in Clarksdale, they shall act on and approve so much of said roll as shall embrace and include the property within the second district of said county, in all things acting upon said rolls, so far as the territory embraced in each of the respective districts is concerned, in the same manner as though the action on, or approval thereof, related to the approval of assessment-rolls of different counties; and the assessor and clerk shall provide suitable copies of said entire rolls, as finally approved, in all instances when required by law, as though said rolls related to different counties; *Provided*, That only one copy of each shall be required to be filed with the auditor of public accounts when the rolls shall have been approved for, and so far as the same shall relate to, each of said districts."

The assessor of the county completed and returned the rolls as required by law, and the board of supervisors, at the proper meeting for the transaction of business at Friar's Point, took up and considered the land assessment-roll of the whole county. At this meeting the board did not confine its examination to so much of the roll as related to lands in the first district, as by law it was expressly enjoined to do, but extended its action to lands indifferently in both districts.

The appellant was the owner of a body of land in the second, or Clarksdale, district, which had been assessed at from one to two dollars per acre. This assessment the board, at this meeting, increased to four dollars per acre. It then directed its clerk, the appellee, to so change the roll which had been filed by the assessor at Clarksdale, as that it would conform to the roll filed at Friar's Point, as changed by its action thereon.

In conformity with this direction, the clerk made the alterations, and at the next meeting of the board at Clarksdale, presented the roll, so altered, to the board, which, thereupon, made the following order: "Ordered by the board, that the

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assessment-roll for the second judicial district be approved and accepted, the same having been on file with the clerk for the time required by law."

The appellant being dissatisfied by reason of the increased valuation of its land, instituted this action of mandamus against the clerk of the board of supervisors, by which it seeks to compel him to disregard the changes made in the roll in so far as the same relates to lands in the second district, and to make up and certify to the auditor and tax-collector copies of the roll in so far as it relates to such lands, just as it was when filed by the assessor.

The facts above set forth appear by the petition of appellant and by the plea of the clerk, to which plea the petitioner demurred, and, its demurrer being overruled, declined to plead further, and appeals.

It is too clear for contention that the action of the board at its meeting at Friar's Point was a nullity in so far as it related to the assessment of the lands situated in the second district, and its direction to the clerk to change the roll of that district afforded no authority to him so to do. The act of the board and of its clerk were equally unlawful, and constituted nothing more than a spoliation of the roll as returned by the assessor. If the validity of the final act of the board at Clarksdale depended in any degree upon what it did at Friar's Point or upon the action of the clerk in making the changes as directed, the contention of the appellant that no lawful alteration had been made of the roll as returned by the assessor, would be supported.

But the unlawful action at Friar's Point cannot affect what was afterwards lawfully done at Clarksdale. At the proper time the board convened at that place, and examined and approved the roll as altered by the clerk. It was competent for the board, at that time and place, to examine the roll in so far as it related to lands in the second district, and to increase the valuation of any property which, in its judgment, had been assessed too low (Code 1892, § 3788), and all persons

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interested are declared to be charged with notice thereof (Code, § 3791), and may appeal to the circuit court, if aggrieved by the decision of the board (Code, § 80).

The mere clerical act of noting on the roll the increase of the valuation may be done by the assessor or by the clerk of the board, if under its direction and in pursuance of it judgment. The fact that the roll had first been altered, and, as altered, was approved, presents the precise result which would have been reached if the supervisors had, at their meeting at Clarksdale, taken up the roll as returned by the assessor, and there made the changes. The board was in session at the proper time and place; it had power to examine and equalize the assessment, and to increase the valuation of the lands of appellant, if, in its judgment, they had been undervalued. The law points out no particular course of proceeding, and that resorted to was violative of no right of the tax-payer, who is fully protected by the right secured to him of appeal to the circuit court.

It is finally contended by appellant that if the power be conceded to the board to give validity to the alterations of the roll made by the clerk under the invalid order made at Friar's Point by an order subsequently made at Clarksdale, that the order appearing on the minutes of the Clarksdale session is not sufficiently definite and specific to operate as an approval of the roll as altered, but must be held to be an approval of the roll as it appeared when returned by the assessor; and this contention includes the proposition that it was necessary for the minutes of the board to show each specific change made by it on the roll.

We are of opinion that the order made by the board, under the facts disclosed in the plea of the defendant, which are admitted by the demurrer to be true, was sufficient to adopt the roll as it stood when the order was made. Manifestly, all changes made by the board must be noted on the roll, for it, in its completed form, is the warrant upon which the collector acts in collecting the taxes due, and a copy of the roll

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filed with the auditor constitutes the charge against the collector for all taxes due to the state.

Section 3788 of the code directs that the roll shall be examined and corrected, and § 3793 provides that the board shall cause to be assessed any property omitted, and to correctly value any property found to be undervalued, and to correct any erroneous description of property found on the roll. All of these things must be done by changes upon the roll itself, for, as we have said, the roll, when completed, is the evidence of the sums due by the persons and property assessed, and is the warrant for action by the collector. But that this is the proceeding contemplated by law, is clear from the concluding paragraph of § 3793, which is: "And the board shall cause all corrections to be made in the rolls, which, being done, the board shall enter an order approving the assessments, with or without corrections, as the case may be, subject to the right of parties in interest to appeal as provided by law."

If the order of the board approving of the roll, be treated as judicial in its character, as appellant contends it to be, it is yet competent to show, by parol evidence to what it relates, to apply it to its subject. 1 Freeman on Judgments, § 273.

The plea of the defendant sets up that the roll had been altered by him before the meeting of the board at Clarksdale, and that it was the altered roll which was examined and approved by the board. This averment is admitted to be true by the demurrer, and, being true, it shows a lawful exercise of its jurisdiction by the board; and from its judgment, so rendered, the appellant, if dissatisfied, should have appealed. Having failed so to do, he is concluded by the roll as approved by the board.

Affirmed.

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Statement of the case.

S. T. RICKS *v.* J. S. RICHARDSON.

1. INJUNCTION. *Jurisdiction. Remedy at law. Supersedeas.*

Where, pending a motion in the circuit court by defendant to set asid judgment by default, the respective attorneys agree, in writing, judgment shall stand in favor of plaintiff for a less amount, and ex tion issues therefor, the defendant, who repudiates the compromise, d ing the authority of his counsel to make it, cannot enjoin the execu in equity, for his remedy at law by supersedeas is plain and adequat

2. SAME. *Matters pending in circuit court. No relief in equity.*

And, besides, where the matters in controversy between the parties are a ally pending in the circuit court, the chancery court will not take co zance of them, since so to do might lead to different results in the courts.

FROM the chancery court of Yazoo county.

HON. H. C. CONN, Chancellor.

Richardson sued Ricks in the circuit court, and, at September term, 1891, recovered judgment against him $2,000. Ricks made a motion to set aside the judgment, the court entered an order overruling it. Afterwards, d ing the term, the defendant moved the court to set aside order, again asking that the judgment by default be set as for reasons stated. This motion was continued generally, order for a stay of execution being entered. Afterwards vacation, a written agreement of compromise was ente into between the attorneys of the respective parties, wher it was stipulated that the judgment should be reduced $1,000, and that there should be a stay of execution u February following, unless it should be necessary, for protection of plaintiff's interest, to issue execution earl Before the next term of court, on December 4, after exe tions on other judgments against Ricks had been issued, ecution was issued on this compromise judgment, which

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Brief for appellant.

levied on certain property of the defendant, who filed the bill in this case to enjoin the execution, alleging, among other things, that the compromise agreement was unauthorized by him; that he did not owe Richardson; and that it was irregular and improper to have execution issued pending his motion in the circuit court to have the judgment set aside. At the ensuing term of the circuit court this motion was overruled, and the judgment was ordered to stand for $1,000. After this, Richardson, having answered the bill, moved to dissolve the injunction, and, from a decree of dissolution, the complainant, Ricks, appeals.

A. M. Harlow, for appellant,

Filed a lengthy brief, discussing the merits of the case, as to the question decided by the court making the following points:

Pending the motion of defendant in the circuit court, there was no authority for the issuance of the execution. It is not true, as contended, that the chancery court had no jurisdiction to interfere, and that the remedy of defendant was in the circuit court by supersedeas. A supersedeas is a writ commanding a party to forbear doing a thing. In England it is an auxiliary process, and was used at common law as a companion to the writ of error. 2 Tucker's Com., 325; 1 Wash., 183. When auxiliary it can have no effect after judgment is carried into execution. 2 Tucker's Com., 326. It only lies where the error is apparent on the face of the proceedings. 3 H. & M., 245. In this state it is generally the mode by which the record and the judgment of an inferior court is removed to a superior jurisdiction for the purpose of correcting errors.

In this case supersedeas could not be resorted to, because, while defendant's motion was pending, it could not be disposed of until the February term, 1892. There was no final judgment. There can be no writ of error or no supersedeas except in case of final judgment. The circuit judge himself

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Opinion of the court.

could not have acted on defendant's motion in vacation, until the February term, 1892.

There was no necessity for a supersedeas. An executi had been issued on the judgment, which was actually su pended, and the defendant had no remedy whatever to pr vent the sale of his property, except by injunction.

Brame & Alexander, on the same side.

T. H. Campbell, for appellee.

The sole ground of interference by injunction was tha because of defendant's motion in the circuit court, plainti was not entitled to execution. Equity had no jurisdicti to interfere on this ground. In the first place, when d fendant's motion was made, he should have obtained order directing a stay of execution on proper terms. B the circuit court had ample power to protect the defenda His remedy in that court was full and complete. *Harringt* v. *O'Reiley*, 9 Smed. & M., 216; Freeman on Ex., § 435 *et seq* 12 Am. & Eng. Enc. L., 145, 146, 147.

Williamson & Potter, on the same side.

The injunction having been improvidently issued, w properly dissolved. The bill shows no ground for equitab relief. The circuit court, in which the case was pending, h power to give the defendant such relief as he was entitl to. Freeman on Ex., §§ 435, 436 *et seq.*; 9 Smed. & M., 21 6 Peters, 648; 22 Texas, 479; 56 *Ib.*, 118; 28 Cal., 68; Ill., 288; 103 Pa., 331; 58 Iowa, 49; 94 Ind., 368.

CAMPBELL, C. J., delivered the opinion of the court.

Apart from all other grounds, we are constrained to a prove the action of the chancellor in dissolving the injun tion as improvidently issued, because the complainant had plain, adequate, complete, simple and appropriate reme for the grievance complained of, by petition to the circ

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court for a supersedeas of the execution. Besides this, the very matter in dispute was pending in the circuit court, and, if this bill were sustained as properly brought, the spectacle might be presented of a decision of the same matter by two courts, with an appeal from each. As long as two separate courts are maintained in our system, litigants are liable to be misled, to their cost, as to which to resort to in a given case; but while this is a great evil, the courts must preserve the unfortunate distinction, except wherein provision is made against it in certain conditions. Constitution 1890, § 147.

Affirmed.

J. S. BARLOW v. L. L. BRITTAIN.

1. EQUITABLE DEFENSE. *Action at law. Marshaling.*

Ordinarily, a court of law, trying legal titles, cannot marshal securities. The right can be availed of only in those exceptional cases where an equitable defense is permitted to which the right of marshaling is a reply. *Black* v. *Robinson*, 61 Miss., 54, distinguished.

2. TRUST-DEED. *Action for property converted. Defense.*

An action at law by the trustee in a deed of trust to recover the value of incumbered personal property, which has been purchased and converted, cannot be defended by showing that the debtor has other accessible property, subject to the deed, and sufficient to satisfy the debt secured thereby.

FROM the circuit court of Copiah county.

HON. J. B. CHRISMAN, Judge.

This is an action, begun in the justice court, by Barlow, trustee in a trust-deed, to recover of appellee, Brittain, the value of certain cotton covered by the trust-deed, which Brittain had purchased from the grantor. The trust-deed, which was duly recorded, covered other property, and, on the trial, defendant introduced evidence to show, among other things, that there was other personal property covered

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by the trust-deed, and still in the possession of the grantor, and accessible to plaintiff, sufficient in value to discharge the secured debt. In view of this evidence, the court instructed the jury for the defendant as follows:

"1. The court instructs the jury for the defendant, that if they believe, from the evidence, that the property, consisting of two horses and fifteen bushels of corn, in the possession of Ben Austin, and embraced in the deed of trust, is accessible to plaintiff, and is sufficient to discharge the debt of plaintiff, they will find for the defendant."

Verdict and judgment for defendant. Motion for new trial overruled, and plaintiff appeals.

R. N. Miller, for appellant.

Under the evidence in this case, there was a clear misapplication of the rule as to marshaling securities.

George S. Dodds, for appellee.

This case is governed by *Black* v. *Robinson*, 61 Miss., 54.

COOPER, J., delivered the opinion of the court.

The first instruction for the defendant should not have been given. It is said by counsel that it was asked and granted upon the authority of *Black* v. *Robinson*, 61 Miss., 54. The learned judge must have considered that decision as authority for the rule that a court of law will marshal securities wherever, under the facts proved, such course would be pursued in equity. This is a misconception of the principle of that case. In *Hunt* v. *Shackleford*, 55 Miss., 94, it had been held that the beneficiary in a deed of trust for the payment of debts, who was entitled to the proceeds of the property, could interpose his claim for the money as a set-off, when sued upon an independent cause of action by a person who had converted the property to his use. In *Black* v. *Robinson*, *supra*, we recognized the rule announced in *Hunt* v. *Shackleford*, but held that the equity of the defendant might

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be opposed by another equity of the plaintiff springing out of the same transaction. In short, that when a court of law permitted an equitable defense to be made, it would try the equity upon equitable principles. In that particular case the equity of the plaintiff was that of marshaling securities, but the decision was rather in limitation of the rule announced in *Hunt* v. *Shackleford* than in extension of the jurisdiction of courts of law over equitable matters. It is not authority for the proposition that a court of law, trying legal titles, can marshal securities; its extent is that, when an equitable defense is permitted at law to which the rule of marshaling securities is a reply, the countervailing equity of the plaintiff will be considered, as well as that of the defendant.

The judgment is reversed.

MACK, STADLER & CO. *v.* MORRIS JACOBS.

1. ATTACHMENT. *Non-resident. Debt not due. Plea in abatement.*

Since, to authorize an attachment against a debtor on the ground of non-residence, the debt must be due, a plea in abatement that it was not due when suit was begun is sufficient.

2. SAME. *Fraud of defendant. Insolvency Relief of plaintiff. Instruction.*

Where, in attachment, the issue is whether defendant had converted, or was about to convert, his property into money, with intent to place it beyond the reach of creditors, it is proper to refuse an instruction that if defendant led plaintiff to believe he was insolvent, and that he was about to so convert property, the jury shall find for plaintiff; unless the question is one of defendant's estoppel to deny the ground of attachment, plaintiff's belief as to defendant's solvency, or the truth of the grounds of attachment, is immaterial.

3. SAME. *Damages. Act* 1884. *Special verdict. Instruction.*

Under the act of 1884 (Laws, p. 76) the jury, in attachment, may assess punitive damages against the plaintiff, if it certifies in the verdict that

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it believes that the attachment was sued out "recklessly or wantonly, and without probable cause, or with intent to oppress the defendant." In such case, the plaintiff cannot complain of instructions that impose on defendant the greater burden of showing that the attachment was *maliciously* sued out.

4. CONSTITUTIONAL LAW. *Act* 1884. *Verdict. Finality.*

Section 1 of said act of 1884 is not unconstitutional because it provides that the jury may render a special verdict, and assess punitive damages against the plaintiff in attachment in certain cases, and that "any verdict they may assess shall stand," unless the court shall certify that it is grossly unconscionable, or unwarranted by the facts. The legislature may prescribe the terms on which creditors may resort to the extraordinary remedy by attachment.

FROM the circuit court of Jackson county.

HON. S. H. TERRAL, Judge.

This is an action of attachment begun in December, 1891, by Mack, Stadler & Co. against Morris Jacobs. It is subject to the provisions of "An act relating to attachment cases," approved March 11, 1884 (Laws, p. 76), the first section of which is as follows:

"SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That if, upon the trial of a plea in abatement to any attachment, the jury shall find for the defendant, and shall certify in their verdict that they believe the attachment was sued out recklessly or wantonly, and without probable cause, or with intent to oppress the defendant, then they shall not be confined to actual damages merely, but any damages they may assess for the defendant shall stand, and judgment be entered therefor, unless the court shall certify, in the judgment setting aside such verdict, that in its opinion the same is grossly unconscionable, or wholly unwarranted by the facts."

The grounds of the attachment are stated in the opinion. The defendant traversed the affidavit, and on the trial of the issue thus raised the jury returned the following verdict: "We, the jury, find for the defendant, and find that the attachment was malicious, wrongful, and sued out without prob-

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able cause, and with intent to oppress the defendant, and assess his damages at $900. Judgment was entered accordingly, and, after motion for new trial overruled, plaintiffs appeal.

As the questions passed on by the court arise on the pleadings and instructions, it is not necessary to set out the evidence. It was conflicting, but sufficient, in the view of this court and the court below, to warrant the verdict.

The instruction for plaintiff, which is specially noticed in the opinion, is as follows:

"The court instructs the jury that, although they may believe that the defendant was solvent at the time the attachment was sued out by it, if they believe that his conduct and language to plaintiff was such as led plaintiff to believe him to be insolvent, and that he was converting, or was about to convert, his property into money, or evidence of debt, with intent to place it beyond the reach of his creditors, they should find for plaintiff, if they believe that the language or conduct of defendant was such as warranted the charges contained in the affidavit."

The instructions for defendant, commented on by the court, are as follows:

"1. The court instructs the jury that if they find from the evidence that the attachment was sued out maliciously, wrongfully and without probable cause, or with intent to oppress the defendant, then the form of their verdict may be: 'We, the jury, find for the defendant, and find that the attachment was malicious, wrongful and sued out without probable cause, and with intent to oppress the defendant, and assess his damages at $.....'"

"5. The court instructs the jury, in behalf of the defendant, that, if they find for the defendant, they will assess to him such damages as the evidence shows he has sustained by reason of the wrongful suing out of the attachment; and if they believe that the attachment was sued out maliciously, recklessly and without probable cause, or with intent to oppress the defendant, then the jury are not confined to actual

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Brief for appellants.

damages, but may assess damages for injury to defendant's reputation and credit."

Nugent & Mc Willie, for appellants.

1. The affidavit does not conform to the statutory requirement, but treats the debt as one due; and the defendant in the court below proceeded to trial without any question as to the propriety and sufficiency of the affidavit. The only proper course would have been by motion to quash the affidavit because the debt was not due. Had this been done, the question of the maturity of the debt would have been the only issue involved. A plea in abatement of the character employed in this cause is not authorized in this state. It is certain that the jury must have been influenced by the fact that the debt was not due.

2. The first instruction for plaintiff should have been given. There was evidence tending to show the hypothetical state of facts relied on, and it should have been given, notwithstanding its general language. *Roach* v. *Brannon*, 57 Miss., 490; *Cocke* v. *Kuykendall*, 41 *Ib.*, 65; *Penny* v. *Holberg*, 53 *Ib.*, 567; *Morgan* v. *Nunes*, 54 *Ib.*, 308.

3. The first instruction for defendant was erroneous. There was no real issue in the cause to justify the charge. If there was, there is no evidence to warrant the finding that the attachment was malicious. The very giving of the charge must have induced the jury to think that the presiding judge considered there was evidence to sustain it. The court had nothing to do with the question of damages. If it had, we presume it might have given in charge the statute itself. Certainly no words not found in the statute should have been adopted by the court. Besides, there is no rule in it prescribing the admeasurement of damages. Ordinarily, damages must be natural and proximate. Under this statute, the jury may award damages wholly speculative. There was no malice or oppression intended, and the damages should have been limited to such as were actually sus-

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Brief for appellee.

tained. *Meyers* v. *Farrell*, 47 Miss., 281; *Marqueze* v. *Sontheimer*, 59 *Ib.*, 430. The act of 1884 is scarcely constitutional in the form it which it appears, since it gives neither chart nor compass to the jury, and takes away the right of appeal.

Mayes & Harris, for appellee.

1. The objection that the ground of attachment was admitted because the plea did not deny non-residence, comes too late. It is made in this court for the first time. *Railroad Co.* v. *Minor*, 69 Miss., 710. Further, plaintiff went to trial on the affidavit without objecting to its sufficiency.

2. In fact, however, the denial that the debt was due is a good answer to the affidavit. Under the code of 1880, the attachment did not lie on a debt not due, on the ground of non-residence. Ordinarily, it is not competent, on the traverse of the affidavit, to go into the question of the existence of the debt sued on, but that is because the matter is in bar, and not in abatement. One who is a non-resident is not necessarily liable to attachment on that ground. The cause for attachment is not perfected unless the debt is due. Here is an attachment on two grounds, and both must exist. The non-resident cannot deny the first ground—namely, that he is a non-resident—but can deny that the debt is due. We submit that the only proper answer is a denial that the debt is due, and this is a complete defense. If it is sustained, the suit must abate. In *Lowenstein* v. *Aaron*, 69 Miss., 341, this court has exploded the idea that, on the trial of an attachment, the investigation is always to be limited to the existence or non-existence, literally, of the grounds averred for attachment.

3. Plaintiff's first instruction was properly refused. It was not correctly drawn, and the testimony in the case did not justify it. Insolvency had nothing to do with the issue involved. The instruction is a stagger at the doctrine of *Cocke* v. *Kuykendall*, 41 Miss., 65. But it omits wholly the element necessary in estoppel—namely, that the affiant must

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have believed the charges made in the affidavit to be tr
Plaintiff's belief, under the evidence, was immaterial.

4. It is admitted that the first and fifth instructions
the defendant did not accurately follow the statute, but
fail to see how the departure was prejudicial to plainti
If there be error, it is not reversible error.

5. The verdict was sufficient as a statutory verdict, un
the act of 1884, for it was only necessary for the jury to fi
one of three things—namely, (1) that the attachment w
sued out recklessly and without probable cause; or (2) th
it was sued out wantonly and without probable cause; or
that it was sued out with intent to oppress the defenda
The finding of the jury went further than was necessary.
was sufficient to find that it was sued out without proba
cause and with intent to oppress the defendant. Surely
will not be condemned because, in addition, the jury retur
that the attachment was malicious.

WOODS, J., delivered the opinion of the court.

The affidavit of appellants for the attachment alleges a
charges "that Morris Jacobs is justly indebted to the s
firm of Mack, Stadler & Co., in the sum of five hundred a
thirty-five dollars, and that said defendant is a non-resid
of this state, or that he has converted, or is about to conv
his property into money or evidences of debt, with intent
place it beyond the reach of his creditors." The plea
abatement of appellee avers "that at the time of suing
of said attachment, the said plaintiff's debt on the cause
action on which they sue was not due; and that he had
converted his property into money or evidences of debt w
the intent to place it beyond the reach of his creditors,"
On this plea appellants went to trial, and the sufficiency
the plea was taken for granted by counsel on the respect
sides, and by the court below. Here, in argument before
the ground is taken that the plea in abatement did not ch
lenge the propriety or sufficiency of the affidavit made

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procure the attachment. This ground, now taken here, is untenable, even if it had been assumed at the proper time in the court below.

It will be remembered that, to sustain an attachment against one on the ground of non-residence, the debt sued for must be due. The affidavit in the case at bar charges that the debt sued for is due, and the brief of counsel for appellant frankly admits this. Two essential facts must concur to sustain the first ground of this attachment, viz.: the non-residence of the attached debtor, and the present maturity of the day of payment of the debt. The debtor, in the case in hand, was a non-resident; the debt was not due. What was the wrongfully attached non-resident debtor to plead? Plainly, he could not simply traverse the language of the affidavit only. He could not aver that he was a resident. He must plead, if at all, in effect, as follows: "True, I am a non-resident of the state, but the debt for which my estate has been seized under attachment is not due, and, hence, I am not liable to attachment under the laws of this state, and this ground of attachment is not maintainable." And this is exactly what the plea in abatement amounts to. It was the proper plea, the only plea, if the appellee desired to contest this alleged cause for which the attachment was sued out. It admitted one of the essential facts, and denied the other. The counsel and the court below were not in error in treating the plea as a sufficient traverse of the first ground of the attachment.

This view disposes of the errors assigned as to the action of the court in the rulings as to evidence, and it is only necessary to consider the refusal of the first instruction asked for the appellants. The instruction makes the solvency or insolvency of the attached debtor, and the belief of plaintiffs as to his condition financially, induced by the conduct and language of the defendant, prominent factors in determining the issue raised by the plea in abatement. This statement is so glaringly inaccurate as to need no refutation. The belief of plaintiffs as to defendant's solvency or insolvency was not

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in issue at all, and their belief as to his supposed conversi of his property into money, etc., was not the issue to tried and determined. That issue was: did the facts alleg in the affidavit for the attachment, and traversed by the pl in abatement exist? Of course, a case may be imagin when the defendant would be estopped to deny the truth the fact alleged in the affidavit; and this, we suppose, what this refused instruction was intended to tell the ju But the statement of the principles of law contained in find no support in any adjudications of this court. It proper to say, too, that the evidence in the case did not wa rant any instruction embodying the doctrine of estoppel a plicable in cases of attachment.

The first and fifth instructions given for appellee are n erroneous. The language employed is not precisely th used in the statute, but it could not have been hurtful, unl to the appellee himself. By the language of these instru tions he had, we think, a burden greater than that creat by statute put upon him. He saddled himself with the ta of satisfying the jury that the attachment was sued out *m liciously*, instead of *wantonly*, as the statute denominates It is not for appellees to complain, in our opinion. Besid the jury was told by this instruction that, if the attachm was sued out with intent to oppress the defendant, then verdict need not be confined to actual damages, but may clude damages for injury to defendant's reputation and cre and the jury found that the attachment was sued out w intent to oppress the defendant.

The learned counsel for appellants suggest a doubt as the constitutionality of the first section of the act of 1 (Laws, p. 76), in which it is declared that verdicts like one in hand *shall stand*, etc. We need only say that we conceive of no ground upon which the doubt suggested, urged, by counsel can rest. The statute creates and con upon creditors an extraordinary remedy for the collectio their debts. Can any plausible reason be assigned for de

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Statement of the case.

ing to the legislature the right to prescribe the terms upon which creditors shall undertake to use and employ this extraordinary remedy against their debtors?

Affirmed.

RICHMOND & DANVILLE RAILROAD CO. v. R. T. BURNSED.

1. RAILROADS. *Shipment of live-stock. Transportation of shipper.*

A stipulation in the bill of lading of live-stock that the shipper designated in it may accompany the stock on the freight-train free of charge can be availed of only by him. Another, though assisting the shipper, and claiming an interest in the stock, who, without procuring a ticket or tendering his fare, also boards the train with the shipper, intending to ride free, does not thereby become a passenger.

2. SAME. *Trespasser on train. Injury to. Case.*

And if, soon after boarding a train, a collision is imminent, and, to avoid danger, such person leaps from the train, and is injured, he will not be held to have acquired the rights of a passenger, merely because he had entered the caboose with the shipper, without objection by the conductor, who merely expressed surprise that he also was going, it appearing that the conductor was busily occupied, and, up to the time of the accident, had not demanded his fare, or seen the bill of lading, or learned of such purpose to claim free passage under it.

3. RAILROADS. *Injury to trespasser. Liability for.*

In the absence of wantonness or wilfulness on the part of the servants of a railroad company, it is not liable for injury to trespassers, whether in its train or on its track.

FROM the circuit court of the first district of Carroll county.

HON. C. H. CAMPBELL, Judge.

Action by appellee, Burnsed, against the appellant company, to recover damages for personal injuries. He received the injuries complained of by leaping from a running freight-

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train of defendant to avoid an impending collision with a passenger-train. It is not contended, in behalf of the railroad company, that plaintiff's leaping from the train was not made necessary by the apparent imminent danger of the collision, this having been brought about in consequence of the absence of proper signals. The depot agent at Winona testified that he had displayed a red flag, the usual signal to prevent the freight-train passing his station, and that this was removed by some unknown party. The main contention between the parties is as to whether, at the time of the injury, plaintiff was a passenger.

The facts in evidence throwing light on this controverted question are, briefly stated, as follows: One Gresham, a dealer in mules, shipped from Winona to Greenwood, stations on defendant's railroad, two car-loads of mules. Burnsed, the plaintiff, had agreed with Gresham to buy two of the mules, promising to give security that would be acceptable, but they had signed no written contract, and plaintiff had paid nothing. The bill of lading for both car-loads of mules was made out in favor of Gresham, as the shipper, and consigned to him at Greenwood. As is usual in such contracts for the shipment of live-stock, it was stipulated that Gresham should have free transportation on the freight-train carrying the stock. Several of the mules belonged to the father-in-law of plaintiff, and plaintiff had these in charge, but the contract for the shipment was made entirely with Gresham. Plaintiff's name did not appear in the bill of lading, and he was not known to the agent of defendant in the transaction, but, in connection with one Neily, he assisted Gresham in loading the mules into the cars. When the freight-train, containing the loaded cars, left the depot at Winona, Gresham, Neily and the plaintiff, having been informed that the train would stop at a tank and crossing in another part of the town, overtook the train there, and entered the caboose. The conductor assisted them to enter, remarking at the time, "I didn't know that you were all going with the stock; you

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Brief for appellant.

liked to have gotten left." He then sat down, and was busily occupied writing, and made no other remark to them. Before reaching the first station, a passenger-train was discovered approaching on the same track. The brakes were applied to the freight-train, and all on board leaped from the train to escape the danger of the collision. The collision was averted, but plaintiff sustained severe injuries.

The conductor of the freight-train testified that, after leaving Winona, which was a junction point, he was busily occupied checking up way-bills; that, up to the time of the accident, he had not examined the bill of lading, and did not know that plaintiff and Neily were also claiming the right to free passage on the train; that, for this reason, he had not demanded their fare. It was shown in evidence that the rules of the defendant prohibited the carrying of passengers on freight-trains, except in cases where the shipper of live-stock was given free transportation. It was further shown that, under the rules of defendant, free transportation was given to only one man, where the shipment of stock did not exceed two car-loads.

On the trial, the above facts having been developed, the court refused to grant a peremptory instruction in favor of the defendant. It instructed the jury that, under the evidence, plaintiff was not a passenger, but that if the jury believed from the evidence that the defendant was guilty of gross or wilful negligence, it was liable, although plaintiff was not a passenger.

It is not necessary to set out the other instructions given or refused. The plaintiff had verdict and judgment for $2,500. Motion for new trial overruled, and defendant appeals.

A. F. Fox, for appellant.

The peremptory instruction for defendant should have been granted. Plaintiff declared on a contract between the company and himself as a passenger in charge of stock owned

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Brief for appellee.

by him. The declaration is not sustained. He owned stock, was not a shipper and was not a passenger, or eve licensee. The defendant owed him no duty, and would liable to him only for wilful wrong. Granting the neg gence of defendant, causing the danger of collision, it clear that there was no wilful or intentional injury. T court rightly charged that plaintiff was not a passeng Freight conductors have no implied authority to invite str gers to become passengers. In the absence of express thority, their invitation cannot make strangers passenge Patterson's Ry. Ac. Law, 299. When the conductor pressed surprise that all three were going, plaintiff made reply, and thus, through his own fraud and deceit, was p mitted to board the train. Plaintiff had no intention paying his fare, and, as he was riding on a freight-train violation of the rules of the company, he cannot recover injuries caused by mere negligence. This is true, even the injured person is a licensee on the train. 153 Mass., 1 47 Am. & Eng. R. R. Cases, 580; 2 *Ib.*, 1; 51 Conn., 143; Ala., 356; 91 Pa. St., 458.

The railroad company is not liable to passengers on freig trains except for gross negligence. Certainly they are un no obligations to trespassers, except not to inflict on th wanton or wilful injury.

Southworth & Stevens, and *Calhoon & Green*, for appellee

Appellee was not a trespasser. He had an interest in stock. He was on the train by invitation of the conduc and was rightfully in charge of the stock. He was asked no fare. The remark of the conductor, as plaintiff ente the caboose, was apologetic for going off to the tank wi out him. Whether plaintiff was named in the bill of lad or not, the conductor treated him as owner of the stock, recognized his right to be on the train. It is not kno that plaintiff knew of any regulation limiting the num who could accompany a shipment of live-stock.

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Opinion of the court.

It cannot be denied that the agent at Winona was negligent in not keeping a watch over the signal-flag and keeping it exposed. In any aspect the company is liable for gross negligence. This is the theory upon which the case was tried. 2 Redfield on Railways, 235; 93 U. S., 291; 95 *Ib.*, 635; 2 Beach on Railways, § 857; Patterson's Railway Ac. Law, § 210.

That plaintiff was not a trespasser but a passenger, see 4 Am. & Eng. Railroad Cases, 589; 2 Woods on Railroad Law, 1045; Beach on Railroads, § 857; 2 Redfield on Railways, 236; Patterson's Railway Ac. Law, 204; 14 How., 468; 12 Wall., 369.

That liability is fixed by wilful wrong alone, is in conflict with *V. & M. R. R. Co.* v. *Phillips*, 64 Miss., 693. We refer the court to the first refused instruction in that case. See also *Railroad Co.* v. *Allbritton*, 38 Miss., 242; *Express Co.* v. *Brown*, 67 *Ib.*, 260.

Argued orally by *A. F. Fox*, for appellant, and *W. F. Stevens*, for appellee.

WOODS, J., delivered the opinion of the court.

The appellee's theory of the case, as disclosed in his declaration, is that he was a passenger on a freight-train by virtue of a contract of carriage of stock made with the appellant, under which he was entitled to free transportation because of his ownership of a part of the mules. The appellee's evidence utterly fails to support his theory. It is manifest that the stock was owned by Gresham and Loudon, and that the contract of carriage was made with Gresham alone. It is equally certain that Gresham's name alone appeared in the bill of lading, and that he alone was by the contract entitled to the free transportation. It is admitted that all of the animals were consigned to Gresham, at Indianola. By the appellee's own testimony, he had merely a verbal agreement to buy some of the mules, after Indianola had been reached,

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and then only if he could make the security required. It is idle to discuss the question of ownership. The appellee conclusively fixes that in Gresham. By his own evidence, too, he is shown to have been improperly on the train. He had no contract with the railroad; he was not even seen by the railroad agent; he did not go near him when the contract was made; his name was not mentioned to the agent, and was not inserted in the bill of lading, as must have been done to entitle him to transportation. He was a trespasser, pure and simple. He was attempting to get a free ride from Winona to Indianola when he received the lamentable injury complained of. The learned judge in the trial court properly declared to the jury that appellee was not a passenger, and was not entitled, under the rules of the defendant company, or by virtue of any contract with the company, to ride on that train. He was a naked trespasser, and his right to a recovery must be determined by the wantonness or wilfulness of the company's servants in the matter complained of. The company owed this trespasser no duty other than that of doing him no wanton or wilful hurt. The company was not answerable to him for negligence, for it was under no obligation, contractual or other, to carry him safely. Gross negligence, by the statute law of this state, is made the test of a right to recovery by a passenger on a freight-train, and we have never anywhere seen that a passenger and a trespasser occupy the same relations to the carrier, or that they stand upon the same ground. The company was under no contract, express or implied, to safely carry appellee. He was attempting wrongfully to secure a ride without paying for it, and he must be held to have assumed all the perils incident to the ride. Under settled rules of public policy, railway companies are not to be made liable for injuries received by trespassers upon their trains, unless the injury is inflicted under circumstances indicating wantonness or wilfulness in the servants of the companies. The rule seems to be almost universally

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recognized and approved, and is in consonance with reason and right.

Toledo Ry. Co. v. *Brooks*, 81 Ill., 245–292; *Chicago R. R.* v. *Michie*, 83 Ill., 427; *Toledo Ry. Co.* v. *Beggs*, 85 Ill., 80; *McConley* v. *Tenn. Co.*, 93 Ala., 356; *Louisville Ry. Co.* v. *Phillips*, 112 Ind., 59; *Powers* v. *Boston R. R.*, 153 Mass., 188; *Brown* v. *Missouri Ry. Co.*, 64 Mo., 536; *Duff* v. *Allegheny R. R. Co.*, 91 Pa. St., 458; and *Gardner* v. *New Haven Co.*, 51 Conn., 143, were all cases involving the rights of intruders in cars, trespassers on trains, and not trespassers on tracks or premises, and the foregoing doctrine, as stated by us, was applied as recognized law. The doctrine is to be found in the text-books generally.

Can it be seriously insisted that a trespasser upon a train occupies a better position than trespassers on tracks? If degrees in trespass could be established, it occurs to us that the train trespasser is a greater wrong-doer than the track trespasser. He, like the track trespasser, is entitled to exemption from wanton or wilful injury, or from injury that might and should have been avoided by the railway company after seeing the danger of the trespasser's situation. This court has repeatedly so held. *Stroud* v. *M. & O. R. R. Co.*, 64 Miss., 784; *Dooley* v. *M. & O. R. R. Co.*, 69 Miss., 648; and *Railway Co.* v. *Williams*, 69 Miss., 631.

The able counsel for appellee is mistaken in supposing that the case of the *V. & M. R. R.* v. *Phillips*, 64 Miss., is in conflict with the preceding opinion, or that it is authority for the doctrine that negligence alone will entitle a trespasser to recover for injuries received without fault on the part of the railroad company's servants after seeing the trespasser's peril. In that case, a little boy of tender years was enticed upon a train side-tracked at Jackson by the music of a band playing thereon, and was cursed and driven out by a railroad employe after the train had got in rapid motion, whereby, in an effort to escape the abusive and profane and threatening employe, the child fell under the wheels of the train, and

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was horribly mutilated. The second instruction asked
the railroad in that case sought, virtually, to constrain a
dict for the company by excluding from the jury's consi
ation the peril of the child, and the railroad's knowledg
that peril, when the child was being cursed and driven f
the car, as well as all inquiry as to whether, but for the
ployé's outrageous behavior in the perilous situation of
child at the time, the injury would not have been aver
An instruction should be applicable to the facts of the
ticular case; and the second instruction of defendant, refu
by the court in the Phillips case, did not meet this sens
requirement.

That the appellee was not a passenger by invitation
license from the conductor is too clear for controve
When the appellee and his two companions overtook
train at the tank, the remark of the conductor was
pressive of his surprise at the appearance of *all* the pers
as passengers under the contract of carriage for the car-
of mules. He did not then know what rights they, or
of them, had acquired under that contract, and he had
opportunity or occasion to examine the bill of lading, wh
served the purposes of a ticket in such case, and ascer
whether appellee was rightfully on the train, before the
cident occurred. He simply did his duty in courteously
ceiving a professed passenger—one holding himself out
passenger—and in courteously treating him, in the absenc
knowledge that the ostensible passenger was, in fact, a n
trespasser.

The peremptory instruction asked by the appellant sho
have been given, and, for the error committed in refusin
the case must be reversed. This view obviates the neces
of passing upon any of the other contentions.

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Opinion of the court.

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L. MARKS v. JOHN HOWARD ET AL.

UNLAWFUL DETAINER. *Remedy. Trust-deed. Purchaser. Code* 1880, § 2645.

The purchaser of land at trustee's sale, under a trust-deed with power of sale on default, is entitled, as against the grantor, who withholds possession, to maintain the action of unlawful entry and detainer provided by § 2645, code 1880.

FROM the circuit court of Quitman county.

HON. R. W. WILLIAMSON, Judge.

The appellees executed a trust-deed, conveying certain land to a trustee, to secure an indebtedness to appellant, Marks. After default, the land was regularly advertised and sold by a substituted trustee, and purchased by Marks, the beneficiary. Appellees refused to surrender possession, and Marks brought this action of unlawful entry and detainer, under § 2645, code 1880. The trial in the justice court resulted in a judgment for defendants, and plaintiff appealed to the circuit court, which held that the remedy given by said statute could not be invoked by the purchaser from the trustee, and therefore a peremptory instruction was given for defendants. Judgment accordingly, and plaintiff appeals.

St. John Waddell, for appellant.

Section 2645, code 1880, is identical with § 1582, code 1871, under which it has been held this remedy lies in favor of the purchaser at trustee's sale, as against the grantor who withholds possession. *Ragan* v. *Harrell*, 52 Miss., 818.

No counsel for appellee.

COOPER, J., delivered the opinion of the court.

The appellees are not represented in this court, but we have carefully examined the record to discover any failure of appellant to support his right to recover possession of the

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Opinion of the court.

land sued for, and find all the facts upon which that ri
rests clearly proved. We are advised by the brief of co
sel for appellant that the court below was of opinion th
purchaser of land under a sale made by a trustee, in a
veyance to secure the payment of a debt, with power of
in default of payment, could not recover possession of
land in this action, but must resort to an action of ejectm
This is an erroneous view of the law. The code provi
§ 2645, that "any one deprived of the possession of land
force or intimidation or fraud or stratagem or stealth,
any landlord, vendor, mortgagee, or trustee, or *cestui que t*
or other person against whom the possession of land is w
held, by his tenant, vendee, mortgagor, grantor, or ot
person, after the expiration of his right by contract, exp
or implied, to hold possession, and the legal representat
or assigns of him who is so deprived of possession, or f
whom possession is so withheld, as against him who so
tained possession, or so withholds possession, after the e
ration of his right, and all claiming to hold under him, sh
at any time within one year after such deprivation or w
holding of possession, be entitled to the summary rem
herein prescribed."

The appellees had executed a deed of trust upon t
lands, and, after forfeiture, their right of possession
against the trustee, expired. The trustee thereafter ha
right to invoke the summary remedy afforded by the s
ute to recover possession of the land. By the sale and
veyance this right, together with all other rights existing
the trustee, passed to the purchaser, who became the
signee of the trustee, holding in privity with such trus
and, as such, entitled to maintain this action.

Judgment reve

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Statement of the case.

WESTERN UNION TELEGRAPH CO. v. W. V. SULLIVAN.

1. JUSTICE OF THE PEACE. *Jurisdiction. Action on penal statutes.*

The jurisdiction "of all actions for the recovery of debts or damages or personal property" conferred on justices of the peace by code 1871, § 1302, and code 1880, § 2190 (code 1892, § 2394), embraces suits "founded on any penal statute," although these words, which appear in the corresponding section of code 1857 (p. 405), were not brought forward.

2. SAME. *Appeal. Penalty less than fifty dollars. Code* 1880, § 2354.

Accordingly, the jurisdiction of the circuit courts in suits for penalties, where the principal of the demand does not exceed $150, is purely appellate, and if the amount in controversy does not exceed $50, no appeal lies to the supreme court. Code 1880, § 2354.

MOTION in supreme court to dismiss the appeal.

Appellee, W. V. Sullivan, brought an action against appellant, the Western Union Telegraph Co., in a justice court of Lafayette county, to recover the sum of twenty-five dollars, the statutory penalty prescribed by the act of 1886 (Laws, p. 91) for failure to promptly transmit and deliver a telegram. There was a judgment for plaintiff in the justice court, and also in the circuit court, on appeal, for the said amount. Thereupon, defendant appeals to this court, contending that § 2354, code 1880, which grants the right of appeal to the supreme court in suits originating in the justice court only where the amount in controversy exceeds fifty dollars, does not apply, because this is a suit on a penal statute, and justices of the peace have no jurisdiction of such suits, even where the amount is within their jurisdiction; that the words "founded on any penal statute," which appear in article 7, p. 405, code 1857, containing the grant of civil jurisdiction to justices of the peace, have been omitted from the subsequent codes; that the justice of the peace, being without jurisdiction, the circuit court will be deemed

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Opinion of the court.

lan nave tried the case under its original jurisdiction, a
rest an appeal will therefore lie to this court.
se Appellee moves to dismiss the appeal.
p
v *Brame & Alexander*, for motion.
j

Mayes & Harris, contra.

The justice court has no jurisdiction of any suit based a penal statute, unless the statute confers it expressly. *C* v. *Board of Police*, 38 Miss., 340; 13 S. E. Rep., 431; 11 296; 84 Ga, 804. The act of 1886 is a penal statute, and penalty is a distinct demand. *Wilkins* v. *Telegraph Co.* Miss., 6. The act confers no jurisdiction, but leaves tha the general statutes.

The demand here is not a debt, nor is it damages, be for a sum certain. 3 Serg. & Rawls (Pa.); Am. & Eng. E L., "Debt;" 7 Hill, 301; 4 How. (U. S.), 21; 3 Metc., 5 2 Tex., 481; 5 Md., 337; 47 Ark., 344; 86 Ga., 104; 69 I 199. The jurisdiction conferred in suits on penal statutes code 1857 has been omitted designedly from the subsequ codes.

As the justice of the peace had no jurisdiction, the cir court either had original jurisdiction and the judgment valid *original* judgment, or that court was without juris tion because the magistrate had none, and the judgmen void. In either case, an appeal lies to this court—in the case to test the correctness of the judgment, or, in the ot case, to test its validity.

Argued orally by *C. H. Alexander*, for motion, and *Mayes*, *contra*.

CAMPBELL, C. J., delivered the opinion of the court.

Section 1302 of the code of 1871 (§ 2190, code of 18 2394, code of 1892), embraces, in terse and comprehen language, all of the jurisdiction conferred on justices of

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Syllabus.

peace by art. 7, p. 405, of the code of 1857, differing only as to amount in controversy. The language of the clause, "founded on any penal statute," contained in the code of 1857, was left out of that of 1871, not to deprive justices of the peace of such jurisdiction, but because it was unnecessary to retain this language, in view of the very comprehensive terms employed by the section, which was manifestly designed to enlarge and extend, and not circumscribe, the jurisdiction of these magistrates. The word "*debts*" embraces penalties recoverable by civil action. In its largest sense, it signifies any thing for which one is liable or bound to another, or which may be exacted of one; and it was used in this sense in conferring jurisdiction on justices of the peace. The terms "*debts or damages or personal property*" embrace every subject of recovery other than realty.

Motion to dismiss sustained.

CHARLES E. CHIDSEY *v.* THE TOWN OF SCRANTON.

CONSTITUTION 1890. *Local law. Repeal. Laws* 1886, *p.* 820.

Section 90, constitution 1890, which directs that certain matters shall only be provided for by general laws, and, among other things, declares that the legislature shall not pass local laws "exempting any person from jury, road or other civil duty (and no person shall be exempted therefrom by force of any local or private law)," does not merely prohibit enacting such laws in future, but repeals existing local laws containing the inhibited exemptions. The act of 1886 (Laws, p. 20), exempting members of Scranton Fire Company from road duty, was repealed thereby.

FROM the circuit court of Jackson county.
HON. S. H. TERRAL, Judge.
The opinion states the case.

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Brief for appellant.

H. Bloomfield and *H. B. Everrett*, for appellant.

The contention of opposite counsel is that the local l under which appellant was exempted is repealed by paragra (*k*), § 90 of the constitution. It will not be disputed that, wit out the parenthetical clause referred to, no existing law the character inhibited would be nullified. That clause m be construed as a comment on, or enlargement of, the se tence in which it is placed. That this is the more ratio interpretation is evidenced both by the use of the pare theses and the word "*exempted.*" Language used in legis tion is to be considered according to its ordinary acceptati The only proper use of the parenthesis is to comment on explain the sentence of which it is a part. Such is the id suggested by its use in this instance. The use of the wo "exempted" is suggestive of the same idea. To say that person shall be exempt by the local law, even if placed in t position of this clause, might convey the idea that existi exemptions should no longer exist, though that would be unnecessary economy of language. But the same idea certainly not conveyed intelligently by declaring, in this ca that no person shall be *exempted* by force of a local la "Shall be exempted," means only to deny the act of exem ing in future, and can, by no process of reasoning, apply persons already exempt. This is the meaning of the la guage used, and it is borne out by the use of the parenthe

It may be said that this construction renders the clau superfluous, but it is as just to the convention to say that did a silly thing as that it undertook to do a sensible thi by silly use of language.

We further insist upon our construction, because priva rights are affected, and we invoke the rule that such co truction shall be given as will best protect such rights. Am. Dec., 81.

The language should be strictly construed. Courts nev favor repeal by implication. *Pecot* v. *Police Jury*, 41 La. An 706; 6 So. Rep., 677.

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Opinion of the court.

Ford & Ford, for appellee.

That the act relied upon was local, and of a character condemned by § 90 of the constitution, is not disputed. It was repealed, not by implication, but by the express terms of paragraph (*k*) in said section. The intention of the convention could not have been more clearly or forcibly expressed if it had referred to the act in question by its title. The object was to have the subjects enumerated governed by general laws, and to annul all local or private legislation. To hold that a part of paragraph (*k*) in parenthesis was intended to serve no other purpose than to explain other parts of the section, is to declare the parenthesis meaningless. Referring only to the future, how could an act of the legislature ever be a local or private *law* if enacted on a subject prohibited?

All laws should receive a sensible construction. General laws should be so limited in application as not to lead to absurd consequences. It will be assumed that the legislature intended such exception to its language which would avoid injustice or absurd consequences. *United States* v. *Kirby*, 7 Wall., 482. Nor can the convention be arraigned for using bad grammar. The appellant attempts to avert the meaning of the constitution by playing on the tenses of the word "exempt." We are unable to appreciate the objection.

The court will not overturn the plain intention of the makers of the constitution, even though it should be of opinion that the verb is used in the wrong tense. *Pointer* v. *Trotter*, 10 Smed. & M., 537.

COOPER, J., delivered the opinion of the court.

Section 90 of the constitution declares that "the legislature shall not pass local, private or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.: (*a*) Granting divorces; (*b*) changing the names of persons, places or corporations; . . (*k*) exempting any person from jury, road or other civil duty

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(and no person shall be exempted therefrom by force of any local or private law)."

The appellant was proceeded against under the ordinance of the town of Scranton for having failed and refused to work on the road. It is conceded that he has been properly convicted, unless he is exempt from such service.

The exemption relied on is claimed under an act, approved March 5, 1886 (Laws, p. 820), which declares "that the active members, to the number of fifty, of Scranton Fire Company No. 1, of the town of Scranton, Jackson county, Mississippi, be, and are hereby, exempt from road tax or duty; and that this act take effect from and after its passage."

It is sought to maintain the exemption by the rule of construction that repeals by implication are not favored, and by a criticism of the structure of the parenthetical clause of paragraph "*k*" above noted.

It is said in argument that this clause does not declare that no one shall be exempt from the duties referred to, but only that no one shall be exempted—meaning that no one shall claim exemption by reason of any special or local law thereafter enacted. This construction, if adopted, would render the clause superfluous, and without any force whatever, for by the first clause of the paragraph, local, private and special laws of the class under consideration are prohibited; the only effect that the clause in parenthesis can have is to withdraw exemptions existing under special or local laws. Nor do we appreciate the criticism of counsel upon the structure of the sentence, for the appellant is not exempt unless *exempted* by the law, and this is precisely what the constitution forbids.

The judgment is affirmed.

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Statement of the case.

CHARLES HUMPHRIES *v.* ILLINOIS CENTRAL RAILROAD CO.

1. RAILROADS. *Fast train. Foreign passengers. Custom to stop.*

Though one knows that a certain fast passenger-train, as a rule, does not stop at the station of his residence in this state, yet, if there is a custom for such train to stop there for the accommodation of passengers holding tickets purchased from connecting railways in other states, he may avail himself of this custom by purchasing such a ticket in another state, and making a contract for transportation to said station on said fast train.

2. SAME. *Special contract. Breach. Recovery. Peremptory instruction.*

In a suit against the railroad company for failure to stop for him to get off at said station, he having purchased such a ticket in another state, it is error to instruct for defendant. There being evidence tending to support his contention, it should be left to the jury to say whether plaintiff had a special contract to be carried to said station on that train, and whether there was such custom—a fixed habit, known to the traveling public—to stop for debarkation of foreign travelers.

FROM the circuit court of the first district of Hinds county.
HON. J. B. CHRISMAN, Judge.

Appellant was in Bowling Green, Kentucky, and there purchased from the agent of a line of railway which connects with the Illinois Central Railroad at Milan, Tennessee, a through ticket to his home, Crystal Springs, Mississippi, on the line of appellee's road. He informed the agent that he wished to go on the first train that went south on appellee's road after Milan, the junction, should be reached, stating his reasons, and the agent sold him the ticket for that train, informing him when it would pass Milan. This was a fast passenger-train, running between Chicago and New Orleans, known as the vestibule limited. On entering the train at Milan his ticket was demanded, and he exhibited it. The ticket was punched by two successive conductors on appellee's road. Soon after reaching Canton, the third con-

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ductor, on being shown the ticket, informed appellant tha the train would not stop at Crystal Springs, and that h would have to get off at Jackson, a stopping-place jus ahead, and await another train that carried local passengers Appellant objected, and informed the conductor that hi business engagements were such that he could not do this He did not wait at Jackson, as suggested, and, the conducto refusing to stop at Crystal Springs, he got off at a watering place beyond, from whence he returned to his home, travel ing about ten miles in a buggy through the cold and dark He brought this suit to recover damages, and on the tria the court gave the jury a peremptory instruction to find fo defendant, and judgment was entered accordingly.

The opinion contains a further statement of the case.

Calhoon & Green, for appellant.

1. One purchasing a ticket for a certain station, to go b a particular train, is entitled to enforce the contract. *Rai road Co.* v. *Nuzum*, 50 Ind., 141; 2 Wood's Ry. L., § 356.

He may rely upon information derived from agents appa ently having authority to act. 2 Wood's Ry. L., p. 1125 *Railroad Co.* v. *Pierce*, 47 Mich., 277.

The real contract may be shown by parol. *Railroad Co.* *Winters*, 143 U. S., 60; *Railroad Co.* v. *Riley*, 68 Miss., 765 *Hubbard* v. *Railroad Co.*, 64 Mich., 634. See also *Plott* *Railroad Co.*, 63 Wis., 511; *Wells* v. *Railroad Co.*, 67 Miss., 2

The rules of the company could not affect the special co tract. Passengers are not presumed to know them. *Bea champ* v. *Railroad Co.*, 56 Texas, 239.

It was for the jury to say whether there was a special co tract.

2. It is shown that there was a custom, known to and r lied upon by plaintiff, to stop this train for through passe gers. On this point see *Railroad Co.* v. *Randolph*, 53 Il 510; *Railroad Co.* v. *Adcock*, 52 Ark., 406.

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Opinion of the court.

Mayes & Harris, for appellee.

1. Appellant's claim is without merit. He had full knowledge of the rules, and was simply trying an experiment.

As to the right of a railroad company to run through trains, stopping at selected stations, see 44 Am. & Eng. R. R. Cas., 292; 127 U. S., 390; 132 *Ib.*, 146; 38 Kan., 608; 50 Ind., 141; 67 *Ib.*, 567; 76 Mo., 288.

2. It is the duty of a passenger to ascertain if the train is to stop at his destination. 9 Am. & Eng. R. R. Cas., 315; 50 Ind., 141.

3. If the passenger is misinformed by the ticket-agent, the conductor is not bound to stop his train in violation of rules. 3 Am. & Eng. R. R. Cas., 340; 18 *Ib.*, 253.

4. Taking up or punching the ticket does not bind the conductor to stop. 53 Ill., 310.

5. The duty of the company, even where the ticket-agent has given the passenger the wrong information as to running of through train, is to give him notice before reaching the station, in order that he may change to local train. 18 Am. & Eng. R. R. Cas., 252; 21 *Ib.*, 319; 34 *Ib.*, 298.

6. Humphries was not misled. There is no evidence that he would have taken any other train than this, if he had not received the alleged information. He was not told that this train would stop at Crystal Springs. He knew it would not stop there.

7. There is no sufficient proof of the alleged custom to stop for any class of passengers.

8. There is no evidence that the agent at Bowling Green had any authority to make a contract changing the rules of appellee.

Argued orally by *M. Green*, for appellant, and *J. B. Harris*, for appellee.

WOODS, J., delivered the opinion of the court.

The evidence of the appellant shows that he purchased a ticket for the train known as "vestibule limited," from Mi-

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Opinion of the court.

lan, in the state of Tennessee, to Crystal Springs, in Mis
sippi. This evidence tends, too, to show that the tick
agent who sold the ticket for passage to Crystal Springs
it knowing that it was to be used on the "vestibule limite
In other words, there is some evidence tending to show t
appellant had a special contract to be carried on a cer
train to a certain point, and that the railroad company fa
to perform the contract. It was shown by the company t
this particular train did not stop at Crystal Springs, an
appears that appellant very well knew this. But ther
some evidence tending to show that it was an establis
custom, in the running and management of the train
stop the "vestibule limited" at Crystal Springs to per
the debarkation of a passenger holding what is denomina
a "foreign ticket"—a ticket purchased beyond the limit
this state, and from the agents of some connecting rail
in another state. We think the jury should have been p
mitted to say whether appellant had a special contract
be carried on the particular train to Crystal Springs,
whether there was a custom—a fixed habit, known to
traveling public—to stop for the debarkation of foreign t
elers.

Reversed and remand

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Statement of the case.

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ENGLISH v. FRIEDMAN.

1. ATTACHMENT. *Fraudulent assignment. Evidence.*

On the trial of an attachment, based upon an alleged fraudulent assignment by the defendant, evidence is admissible that prior to the assignment, as a basis for credit, he furnished creditors statements of his indebtedness that omitted a large debt which it was afterwards claimed he then owed his father, and which was preferred in the assignment. So held, although a fraudulent contracting of the debt sued for was not alleged, and although the statements were made months before the assignment. The evidence is admissible on the question of the genuineness of the debt so preferred.

2. ASSIGNMENT FOR CREDITORS. *Reservation. Subsequent fraud.*

If the assignor, in good faith, had embraced in a general assignment made by him all his known estate, it cannot be avoided because it afterwards appears that he owned land not embraced in it, of which he knew nothing at the time he assigned. Nor can the subsequent bad faith of the assignor in reference to such land avoid the assignment.

3. SAME. *Subsequent fraud of assignor. Case.*

Accordingly, it is error to instruct that a general assignment for creditors is rendered fraudulent by the subsequent conduct of the assignor in attempting to secure for his sister, as against the assignee, land not mentioned in the assignment, which, at the time he assigned, he did not know he owned.

FROM the circuit court of Coahoma county.

HON. R. W. WILLIAMSON, Judge.

In January, 1891, appellants, English & Holmes, merchants, made a voluntary assignment, purporting to convey all their assets for the benefit of their creditors. Certain debts were preferred, among others a debt of about $5,000 to S. G. English, father of one of the assignors. The assignment recites that it is the intention of the assignors to convey all their assets of every kind and description, and if any property is omitted by inadvertence, mistake or otherwise, the assignee

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Brief for appellants.

shall place the same on the schedule of assets, and treat it conveyed by the assignment.

Upon the execution of the assignment certain of the u preferred creditors sued out attachments, and caused them be levied on the goods so assigned. Among those w attached were appellees, Friedman Bros., their affidavit attachment alleging, among other grounds, that the defen ants had assigned or disposed of their property or rights action, or some part thereof, with intent to defraud th creditors. The affidavit did not allege that the debt su on had been fraudulently contracted. Defendants travers the grounds of the attachment, and, on the trial of the iss thus raised, sought to sustain the attachment by showing th the assignment was fraudulent. It is not necessary, in vi of the opinion, to set out all the evidence relied on to susta this contention. So much of it as is necessary to an und standing of the questions passed on by the court is stated the opinion. The fourth instruction, copied in the opini sufficiently indicates the nature of the evidence on which is based.

There was a verdict for plaintiffs. Judgment was ente accordingly. Motion for new trial was overruled, and fendants appeal. The opinion contains a further stateme of the facts.

J. W. & W. D. Cutrer, for appellants.

1. The evidence as to the statements made by Englis Holmes to certain creditors relative to the status of their bu ness a month before the assignment, was clearly incompete The statements were not made to appellees, but were priv statements made to others, and they were never even co municated to appellees. So far as any statement was ma to them, it was solely for the purpose of assuring them as a purchase made long before the transaction on which t suit is based took place. The affidavit in the attachm does not allege that the debt was fraudulently contract

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Opinion of the court.

We submit there must be a limit beyond which statements which a man may make for a specific purpose may not be used against him. This evidence can throw no light on the attachment issue.

2. The judgment for plaintiff resulted mainly from the fourth instruction, relative to the ownership of land by Holmes in Tennessee. The instruction is erroneous. It makes the assignment fraudulent, regardless of the fact that Holmes was in ignorance of his ownership of the land at the time of its execution. It makes the *bona fides* of the assignment depend upon the subsequent conduct of the assignor. A fraud that will effect an assignment must be such as entered into its execution. Subsequent fraud on the part of the assignor cannot be shown.

D. A. Scott, for appellees.

That the reservation by the debtor of a part of his property from the general assignment amounts to a fraud is a familiar rule, and is clearly applicable to this case. It is clear that the land in Tennessee was not included either in the assignment or the schedules, and was not intended by the assignor to be. The following authorities sustain our contention that the assignment is fraudulent as to the plaintiffs. *Arthur* v. *Bank*, 9 Smed. & M., 394; 5 Cowen, 547; 20 Johns., 447; 6 Hill, 438; 6 Ky., 277; 5 Ohio, 293; 4 Ala., 374; 6 Mo., 302; 6 Ala., 179; 2 R. I., 35; Burrill on Assignments, §§ 98, 136. The original words in the assignment cannot operate to pass land which is omitted from the schedule. Burrill, 136; 31 Md., 87; 5 Eng. L. & Eq., 471; 6 Minn., 375; 8 Lea, 67; 37 Mich., 487; 5 Littell (Ky.), 349. An assignment, general on it face, must be so in fact; otherwise, it will not be sustained. 37 Mich., 487; 90 N. Y., 382; 2 R. I., 35; 26 Vt., 462.

WOODS, J., delivered the opinion of the court.

1. The errors assigned upon the action of the court, in

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admitting evidence showing the statements made by a
lants to their creditors or to others, for the purpose of e
lishing a basis of credit, are not well taken. Though
statements were made months before the deed of assign
was executed and the attachments taken out, and th
the affidavits in attachment do not charge, as groun
their issuance, that the debts sued for were fraudul
contracted, yet, in an aspect wholly different from tha
adverted to, the evidence was legitimate and perti
The statements, whose admission was objected to on
were, in effect, that the large debt of $5,000 or mor
perhaps other debts, of the father of English, who was
ferred in the assignment, was not in existence. This
debt was not mentioned in any of the statements, a
existence, by necessary inference, if not by positive
ment, was denied. When the deed of assignment was
duced, in which the father of the partner, English, wa
ferred for $5,000, these statements were admissible as te
to cast doubt upon the genuineness of the debt so pref
The statement that virtually denied the existence o
$5,000 debt to English's father was in conflict with the
of assignment, which alleged and provided for the pre
payment of that sum, and the jury was entitled to al
dence which would shed light upon the genuineness
alleged debt.

2. This instruction was given by the court on beh
plaintiffs below: "The court instructs the jury that if
believe from the evidence that the defendant, Ho
was the owner of any land in the state of Tennessee
date of the assignment, and, after that time, confessed
ment in favor of his sister, and accompanied her attor
Tennessee for the purpose of impressing a lien on said
erty, or subjecting the same to the payment of said
ment, and did not notify the assignee, J. H. Peace,
ownership thereof until at or about the time the sam
seized by other creditors of said defendants, then the

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will find for the plaintiff, notwithstanding said Holmes may not have known, at the date of the assignment, that he was the owner of said property."

Under the rule of law announced in this instruction, no assignment could ever be made by one not possessed of omniscience, at least as to his own affairs and fortunes, past, present and future; and no man, having made an assignment in good faith, would ever dare thereafter to attempt any disposition of any property or estate cast upon him by descent or devise, in another state and unknown to him at the date of the assignment, if the rule is as announced.

In both aspects, the instruction goes beyond the most stringent rules ever prescribed for assignments. If a man in good faith conveys all his known estate, the deed shall not be avoided because it may afterwards be made to appear that the assignor, by descent or devise, at the date of the assignment, was entitled to some estate in a distant state of which the grantor certainly knew nothing when making his assignment, and which unknown estate was not embraced in the deed of assignment. Bad faith is not to be imputed to one for not doing that which it was impossible, morally, to have been done. To vacate an assignment because not embracing a specific article of property, confessedly unknown to the assignor, would be harsh and unjust indeed.

It is equally true that the subsequent bad faith of the grantor will not avoid a deed of assignment. The inquiry must always be as to the good faith at or before the making of the assignment—what was the conduct, what the intent in the making of the assignment, and not what obliquity marks the after conduct of the assignor.

Every way the instruction is fatally erroneous, and was, we cannot doubt, largely instrumental in procuring the verdict.

Reversed and remanded.

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Brief for appellant.

ROSANNA POTTS v. CANTON COTTON WAREHOUSE Co.

1. DEED; CALLS OF. *Boundaries control. Intent of parties.*

When the calls of a deed are for natural or artificial boundaries, thes trol the courses and distances named, because this effectuates the tion of the parties.

2. SAME. *Streets named as boundaries. Calls of deed.*

Where, north of a street which crosses a railroad, there is a parallel extending only to the railroad on one side, and the owner of unp land on the other side sells a lot, describing it as bounded by th streets, the parties treating the unopened street as being extended the railroad, parallel with the other street, there being no doubt their intention, the street, when so extended, will be the northern b ary of the lot, although the distance between the streets is only 25 while the deed calls for 300 feet as the length of the lot.

FROM the chancery court of Madison county.

HON. H. C. CONN, Chancellor.

The opinion contains a statement of the case.

E. E. Baldwin, for appellant.

The proof shows that as far back as 1859 Franklin s extended west of the railroad. This street is shown to been on a straight line. Until the filing of the bill in case, no claim was ever made by the defendant for that of the street lying north of its lot. This was concede every one to be part of the street, the only obstruction b at the railroad crossing. The deed made by Fulton in described defendant's lot as being bounded on the nort Franklin street. Fulton did not know the exact leng the lot, but he knew that it was about 300 feet, and he k that at the north was this street, which he had laid out than six years before. No matter what was given as length of the lot, when the line reached Franklin str stopped.

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Brief for appellee.

In ascertaining boundaries, the rule is that wherever natural or permanent objects are embraced, these control, and both course and direction must yield to them. 21 How. (U. S.), 305; *Morrow* v. *Whitney*, 95 U. S., 551.

It is an unreasonable assumption that Franklin street must, just at this point, bear further north than anywhere else. When defendant built, it made the street the line; but when it needed more ground, it attempted to procure it from the city authorities as a donation of part of the street. Not until then did the defendant attempt to take possession of the street.

Accepting this deed from the city estops the defendant from denying that the city had title to the street. A municipality cannot arbitrarily dispose of its streets regardless of the right of the public to use them. Elliott on Roads & Streets, 661, 662, and cases cited.

The deed from the city conferred no title.

Robert Powell and *W. H. Powell*, for appellee.

Each filed a written argument, as to the questions decided, making the following points:

1. A public street can be established in only one of the following ways: (1) By the exercise of eminent domain; (2) by a deed from the owner of the land; (3) by plotting land and a sale of lots with reference to the street; (4) by user.

Complainant has not shown the existence of a street north of the defendant's lot by any of these methods. Fulton owned all the land between Peace and North streets west of the railroad. There was no vestige of a street across the land between these streets on that side of the railroad. He sold the lot defendant now owns, specifically describing it as 300 feet long, north of Peace street. It is true that it refers to Franklin street on the north, but no street was there. Hence, the location of the street did not limit the lot, but the calls of the deed expressly fixed the location of the street.

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Brief for appellee.

The action of Fulton, six years afterwards, in laying o street only 258 feet north of Peace street, without regar the limit of the lot he had conveyed, was without autho and did not affect the length of the lot. The fact Franklin street was open on the east side of the railr could not affect the extent of the street, or the land wh Fulton had conveyed west of the railroad. The bare m tion of the street in a deed could not have the effect of longing the street indefinitely in both directions. Defend is only occupying the land within the 300 feet north of Pe street.

A boundary, in order to prevail over distances, must fixed and ascertainable. In this case, complainant must sh that in 1863 Franklin street was laid out and opened 258 feet north of Peace street. At that time Fulton had right to locate Franklin street 300 feet north of Peace str and he did so. He could not afterwards diminish the lo locating the street farther south.

The complainant relies on a common law dedication. S dedication is the act of giving property for some public in such manner as to conclude the owner, and there mus an acceptance on behalf of the public. 5 Am. & Eng L., 395, 414. The acts and circumstances, to show ded tion, must be unequivocable. *Ib.*, 398, 399, 400. Use vacant lot by the public is not evidence of its dedication street. The proof must be cogent, and not contradict *Ib.*, 402, 408, 409, 415 and notes.

A dedication, like every other conveyance, require grantor and grantee; one must accept and the other con *Sanford* v. *Meridian*, 52 Miss., 383. It was said in that that grave doubts exist as to whether a court of equity any jurisdiction over an order of a municipal corpora touching its streets.

2. If there ever was a street north of defendant's lo was surrendered by the city in 1890. If the deed of the was effective, it conveys the land adjoining defendant's

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Opinion of the court.

The city has power to close its streets. Code 1892, § 2945. This power is given in the charter of Canton. Laws 1884, p. 519.

3. The complainant wholly failed to establish the allegation of her bill, and the decree should be affirmed.

Argued orally by *E. E. Baldwin*, for appellant.

COOPER, J., delivered the opinion of the court.

This is a proceeding in equity by the appellant to compel the defendant company to remove an obstruction consisting of buildings, etc., erected by it on what is claimed by appellant to be a part of Franklin street, in the town of Canton. The defense is, that the place on which the structures are located is not a part of Franklin street, but is the property of defendant. The case has been before this court on a former appeal from a decree overruling a demurrer, and the decision was in favor of complainant. *Canton Warehouse Co.* v. *Potts*, 69 Miss., 31. That decision settled the law of the case in favor of complainant, who is entitled to relief, if she has proved the case as made by her bill.

The residence of complainant is immediately west of the lot of the defendant company, both lots fronting on Peace street, and running back towards the north. Some distance to the north of Peace street there is, and, at the time of the execution of the conveyances hereinafter referred to, was a street named North street. In the year 1863, one Fulton owned all the land situated between Peace and North streets, and west of the track of what is now the Illinois Central railroad—then the Mississippi Central railroad. The principal part of the town of Canton is east of the railroad. On that side of the railroad there was, in 1863, a street running from the railroad eastward to the town, called Franklin street, located 258 feet north of Peace street. This street had not at that time been extended across the railroad, and the land of Fulton west of the railroad had not been platted, but lay

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in an unimproved, unsurveyed or platted body. The rec
does not disclose whether the course of Peace street was d
east and west, but it does appear that the course of the r
road ran from Peace street about 11 degrees east of Nor
On the fourth day of December, A.D. 1863, Fulton convey
to Mrs. Sarah E. Virden the land now owned by the defe
ant. His deed describes the land as follows: "Beginning
the north side of Peace street, at a stake on the west side
the Central railroad where said street crosses said road, a
thence running west with said street one hundred and fi
feet to a stake; thence north three hundred feet to Frank
street; thence running one hundred and fifty feet east to
Mississippi Central railroad track; thence south with s
railroad track three hundred feet to the beginning."

In 1869 Fulton caused a plat to be made of the land w
of the railroad, and south of a line run on a prolongation
Franklin street. On this plat the lot conveyed by him
Mrs. Virden appears as running back, on a line perp
dicular to Peace street, only 258 feet, or to the south
boundary of Franklin street extended across the railr
and through Fulton's land. In other words, Fulton, in 18
in platting his land, extended Franklin street across the r
road and through his land. The evidence is not satisfact
as establishing an acceptance by the city, or use by the p
lic generally, of that part of Franklin street immediat
north of the defendant's lot. It seems that work was d
on the street at a point farther west, but the use by the p
lic seems generally to have been of that portion of the str
west of defendant's lot, and along a route leading the
north east to where North street crossed the railroad.

In the year 1890, the defendant, desiring to erect a wa
house and cotton compress on its lot, secured a petiti
signed by a number of the residents of the town, to
board of mayor and aldermen of Canton, asking the bo
to abandon Franklin street north of the defendant's lot,
convey it to defendant, on condition that it should erect a

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ton compress on its lot. This petition was granted, and the city authorities conveyed to the defendant so much of Franklin street as was situated north of its lot. The complainant notified the defendant not to close the street, but her protest was disregarded, and the street was closed; whereupon, she exhibited this bill for relief. On final hearing her bill was dismissed, and she appeals.

We agree with counsel for defendant, that the mere acceptance of the conveyance from the municipality does not preclude the defendant from denying the fact of the dedication or acceptance of the street; and also that the defendant is not bound by the act of Fulton, in platting the land, after his conveyance to Mrs. Virden of the lot it now owns. But we are of opinion that the defendant's lot was, by the conveyance from Fulton to Mrs. Virden, limited by Franklin street extended across the railroad to the west. Whether the street had actually been extended across the railroad at the time of the conveyance, is immaterial if the parties to the deed dealt with the land as though it had been.

When the calls of a deed are for natural or artificial boundaries, such boundaries control the courses and distances named in the deed, and this is because the intention of the parties is thereby effectuated. 3 Washb. on Real Prop., 632.

The width and course of Franklin street were fixed by that street as it existed at the time east of the railroad. That street, though not at the time actually extended across the railroad, was dealt with by the parties as though it had been; and just where the street, when extended, would be, was free from doubt. *Id certum est quod certum potest.* If the street had been merely platted at the time of the conveyance, though not actually surveyed or marked by visible boundaries on the ground, and the conveyance had been by reference to the plat, no question could be entertained that fixing it as a boundary would control the courses and distances of the conveyance. There can be no doubt that the parties in-

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Suggestion of error.

tended that Franklin street, extended towards the wes should mark the northern boundary of the lot conveyed b Fulton to Mrs. Virden, and such was the effect of the deed.

The complainant is entitled to relief.

The decree is reversed, and cause remande

W. H. Powell, for appellee,

Filed a suggestion of error, discussing at length the que tion of law and fact involved, and making the followin points:

1. The court erred in assuming that the allegations in com plainant's bill had been proved.

2. It erred in assuming that defendant occupied or ob structed Franklin street. The burden of proof was on com plainant, and she failed to meet it. The evidence is conclu sive that defendant occupied no portion of the street.

3. The court erred in assuming that Franklin street eas of the railroad was only 258 feet north of Peace street. Th record is entirely silent as to this. The complainant faile to make out the allegations of her bill which were denied and she should not secure a reversal in order to have an op portunity to get up more proof in a case which is one o great hardship to the defendant if she should prevail. Th court cannot say, from the record, that Franklin street, extended west across the railroad, would not be 300 fe north of Peace street. It is a fundamental error to assum that Franklin street on the east side of the railroad is onl 258 feet north of Peace street; and if this is assumed, it also an assumption to say that the two streets are parallel.

The alleged street could not control the calls in the dee as to the dimensions of the lot, because the location of th street was not fixed. A boundary, to govern distances, mu be fixed and ascertainable. 3 Washb., Real Prop., 435, 44 450, 451; 95 U. S., 555.

When Fulton sold in 1863, he had the right to lay o Franklin street west of the railroad at any place he sa

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Response to the suggestion of error.

proper, and he fixed its location 300 feet north of Peace street by his conveyance of record.

It is submitted that the decision of the court is in conflict with that rendered in *Berry* v. *McComb City*, 69 Miss., 882. Here the land occupied by appellee was never used, worked or considered by any one as a street.

The interest of appellee is so great, and the injury to it will be so ruinous if the decision stands, that we request a careful review of the record, and earnestly ask a reconsideration.

CAMPBELL, C. J., made the following response to the suggestion of error presented by counsel for the appellee:

This case received full consideration before its decision, as all cases do in this court; but, moved by the earnest appeal of the zealous counsel for the appellee, we have again perused the record, and carefully considered the suggestions urged by counsel in support of the decree of the chancellor, with the result that not a doubt or misgiving as to the correctness of our former conclusion is entertained. If all the evidence of the complainant was excluded, and the case stood on that of the defendant alone, this result would follow. That Franklin street existed east of the railroad, and west of the property claimed by the appellee, is indisputable. It was not used as a street across the northern end of appellee's lot, it is true, but Franklin street, running east and west, was well-known and recognized west of where the present subject of controversy is, and all that was wanting for a continuous street running along where that is was a crossing at the railroad, which had not been made. That the street there had been dedicated and existed, and was known and recognized by the public and by the officials of the city, and by those composing the company, is clearly shown, so that there is no escape from the fact that Franklin street was there, and authority was sought and obtained by those concerned to close it and use it. As a result of a

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Response to the suggestion of error.

popular petition to the board of mayor and aldermen, a
its favorable action on the petition, a conveyance was ma
by the city, through its marshal, to the appellee of "all th
part of Franklin street lying just north of and adjoining t
lot now owned by said Warehouse Co., west of the I. C. R.
in said city of Canton, running east and west the full leng
of said warehouse lot, and the full width of said street, nor
and south, including the sidewalks."

In view of all this, it does not occur to us how it could
expected to avoid the conclusion that Franklin street existe
and was obtained and used as such by the appellee. T
only color of claim that this is not Franklin street is the fa
that the Virden deeds describe the lot as running three hu
dred feet to Franklin street; but it is proved, not assume
that Franklin street is not three hundred feet from Pea
This clearly appears to be a fact, from the maps and tes
mony of Ford and George, surveyors, and other evidenc
which leave no doubt about it. Not a doubt exists th
Franklin street, as dealt with, was a continuous one east a
west. There was a gap or break in it, because of the ra
road, but it was known as a street, and recognized as suc
and the lot, although described as three hundred feet lon
was bounded on the north by Franklin street, and was n
three hundred feet long. It was well known that the stre
was there. The mayor and aldermen were about to open
across the railroad, and abandoned the purpose in deferen
to the remonstrance of the railroad manager. Mr. Priest
says there was a place there for a street, but it was nev
opened. Mr. Owen, the city marshal, always considered
(the ground occupied by defendant) Franklin street, but
was not used or worked as a street. The appellee consider
it Franklin street, and sought and obtained authority fro
the city to close it, and it is too late now to escape the co
sequences of the indisputable fact that Franklin street w
obstructed by the building erected.

The statement of counsel that our decision is in confl

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Syllabus.

with *Berry* v. *McComb City*, 69 Miss., 882, is founded on, and justified only by, a misconception of that case, which presented the question of the bar of the statute of limitations, and we held that the bar attached from adverse possession, from the fact that there was no evidence of dedication of the street claimed. Here the evidence of dedication, and dealing with reference to it, and recognition of it by many and in many ways, is complete. The cases are widely different. We regret the difficulty of the situation, and would gladly mitigate the hardship to the appellee resulting from its reliance on the grant by the city of the use of Franklin street, if the case was such as to warrant it; but we know nothing but the law in deciding between contending parties, and declare that without regard to consequences.

We adhere to the former decision of this case, as to the correctness of which we are assured by the second examination of the case.

Suggestion denied.

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ILLINOIS CENTRAL RAILROAD COMPANY *v.* IDA HUNTER ET AL.

1. RAILROADS. *Fellow-servant. Const.* 1890, § 193. *Fireman, telegraph operator.*

A fireman on the locomotive and a telegraph operator at one of the company's stations are engaged in different departments of labor, or "about a different piece of work," within the meaning of § 193, constitution 1890, and the railroad company is liable for the injury to or death of the fireman by a collision, resulting from the negligence of the operator.

2. SAME. *Const.* 1890, § 193. *Injuries causing death. Who may sue.*

For injuries to an employe resulting in death, an action against a railroad company, based on § 193, constitution 1890, as to fellow-servants, must be brought by "the legal or personal representative"—that is, by the executor or administrator of the decedent.

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Statement of the case.

FROM the circuit court of Copiah county.

HON. J. B. CHRISMAN, Judge.

This is a joint action by Ida Hunter, suing in her o right and as next friend for John Hunter, a minor, to cover of the Illinois Central Railroad Company damages the killing of John Hunter, husband of the said Ida Hun and father of the said John Hunter, plaintiffs. Deceased engaged as fireman on one of defendant's locomotives, a in March, 1892, sustained fatal injuries in a collision, cau by the negligence of defendant's telegraph operator at C tal Springs in failing to deliver an order of the train- patcher to the crew of a freight-train. Defendant plea the general issue, and the case was tried upon an agr statement of facts, which, in addition to the facts abo showed the deceased, at the time of his death, to be thi three years of age, and earning $90 a month, and that plai iffs were wholly dependent upon him for support.

As stated, the action was for the joint benefit of the wid and child, and alleged that, by the death of said husband father, plaintiffs had been deprived of his care, protect and means of support to their damage, etc.

Section 193, constitution 1890, after providing that acti may be maintained against corporations by its employes recover for injuries suffered by the negligence of fell servants engaged in different departments of labor, or fellow-servants on another train of cars, or engaged ab a different piece of work, further provides that "where de ensues from any injury to employes, the legal or perso representative of the person injured shall have the sa right or remedies as are allowed by law to such represen tives of other persons."

Section 1510, code 1880, reference to which is made in argument, is as follows: "Whenever the death of any pers shall be caused by any such wrongful or negligent act omission as would, if death had not ensued, have entit the party injured or damaged thereby to maintain an act

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Brief for appellant.

and recover damages in respect thereof, and such deceased person shall have left a widow or children, or both, or husband or father or mother, the person or corporation, or both, that would have been liable if death had not ensued; and the representative of such person, shall be liable for the damages, nothwithstanding the death; and the action may be brought in the name of the widow for the death of her husband, or by the husband for the death of his wife, or by the parent for the death of a child, or in the name of a child for the death of an only parent, the damages to be for the use of such widow, husband or child, except that in case a widow should have children the damages shall be distributed as personal property of the husband. In every such action the jury may give such damages as shall be fair and just, with reference to the injury resulting from such death to the person suing; but every such action shall be commenced within one year after the death of such deceased person."

No objection was made in the court below to the form in which the action was brought, or for misjoinder of plaintiffs, the controversy, so far as the record shows, being whether the fireman and telegraph operator were fellow-servants, engaged in different departments of labor, or "about a different piece of work," within the meaning of the above constitutional provision. The court below held that they were engaged in different departments of labor, and about a different piece of work, and refused defendant's instruction announcing a contrary doctrine.

Verdict and judgment in favor of plaintiffs for $2,500. Motion for new trial overruled. Defendant appeals.

Mayes & Harris, for appellant.

By § 193 of the constitution, where death ensues, an action can only be brought by a legal or personal representative. This provision being in derogation of the common law, must receive a strict instruction. *Hopkins* v. *Sandidge*, 31 Miss., 668; *Edwards* v. *Gaulding*, 38 *Ib.*, 118; *Hollman* v. *Bennett*,

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44 *Ib.*, 322; *Dibrell* v. *Dandridge*, 51 *Ib.*, 55; *Shatt* *Miller*, 50 *Ib.*, 386; *Boyd* v. *Lowry*, 53 *Ib.*, 352; *Bell* v. *F* 53 *Ib.*, 354; Enderlich on Interpretation of Stat., 173 Sedgwick on Construction of Stat., 271. This rule a with special force where new rights are created an remedies given. Enderlich on Stat., 176; Bishop on W Law, § 249. For rights and remedies, where there is to the employe of a railroad, we must look to § 1 the constitution. The subject begins and ends there. S 663, code 1892, gives a right of action to certain desig persons who, at common law, could not sue. This cla not embrace employes of railroad companies who r injuries from wrongful acts of co-employes. At co law in this state they had no right of action. The con tion gives the right of action, not to all employes, bu designated class of them. The constitution has not atte to define who are fellow-servants. To determine that, ence must be had to the law as it already stood. Befo adoption of the constitution the employe had no rig action for injury caused by the negligence of fellow-ser Now, in certain states of case, he has.

It has been held that a train-dispatcher is a fellow-s of the fireman on the engine. *Millsaps* v. *Railway* Miss., 423. *A fortiori*, the fireman is a fellow-servant operator at a station. They are not fellow-servants on ent trains of cars, nor are they engaged about a dif piece of work. The question is, then, were they enga different departments of work? The term *departm* work is much broader than *kind* of work. Certain court cannot hold that there is a conductor's departm fireman's department, a brakeman's department, and a motive engineering department and so on. We submi these men were engaged in different kinds of work, bu belonged to the same department, being engaged direc moving and operating trains. That requires the con effort of both. It is a matter of common knowledg

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Brief for appellees.

trains are now run by telegraph. See *Lagrone* v. *Railroad Co.*, 67 Miss., 592; McKinney on Fellow Servants, 172 *et seq.*

R. P. Willing, Jr., for appellees.

The single question in the case, as tried, was whether the operator and fireman were fellow-servants. Prior to the constitution of 1890 they would be so considered. But § 193, constitution 1890, has made radical and sweeping changes in the old common law rule of fellow-servants. See *Welsh* v. *Railway Co.*, *ante*, p. 20.

A casual view of the question will decide it in plaintiff's favor. The department of labor of a fireman and an operator are as distinct and diverse as could be imagined. They never come into personal relations. They need never know each other. It is true the courts are hopelessly divided on this question, where not controlled by statutes. But a number of courts have engrafted upon the common law, without express statutory enactment, a limitation upon the old rule, identical with § 193 of the constitution. This section overrules the decisions in our state, which would hold the fireman and operator fellow-servants. This places our courts in line with the courts in these states which have adhered to the "department limitation." The question, therefore, is, what are distinct and what are the same departments of labor? The old rule was founded upon the supposed interests of society, which would be promoted by making fellow-servants insurers, as it were, of each other's faithfulness. The different department limitation, as it is called, had its origin in the fact that, in industrial enterprises, there are so many distinct departments of service that many of the employes rarely, if ever, come in contact with each other. Thus, the reason for the rule fails, and the courts refuse to enforce it. The following authorities have passed upon the question involved: 93 Ill., 309; 108 *Ib.*, 576; 127 *Ib.*, 627; 60 *Ib.*, 171; 58 *Ib.*, 272; 106 *Ib*, 216; 128 *Ib.*, 348. In *East Tennessee Co.* v. *De Armond*, 86 Tenn., 73, the conductor and the tele-

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graph operator were held not to be fellow-servants. exactly the case at bar. In *Haynes* v. *R. R. Co.*, 3 222, the track-repairer and employes of the train we not fellow-servants. In *Morris* v. *R. R. Co.*, 78 Va., track-repairer and brakeman were held to be in differ partments of service. See also 84 Va., 167; 28 W. Va 28 Am. & Eng. R. R. Cas., 360; 30 Ga., 146; 9 Bush,

The contention that the operator and fireman are servants, because engaged in the same work of moving if true, would put the subject forever at rest. It render § 193 nugatory. In *Railroad Co.* v. *Petty*, 67 255, and *Lagrone* v. *Railroad Co.*, 67 *Ib.*, 592, it wa that those were fellow-servants who are engaged in erative work of moving trains. If appellant is rig law is the same now as it was before the constitutio adopted.

The constitution must be construed along with code 1880, which confers upon the wife and child th to sue, except when the widow has children, the da shall be distributed as personal property. The const gives the right of action to the *legal* or personal repr tive. It is admitted that plaintiffs were the survivin of the deceased, and, there being no debts and no ad tration, they are his legal representatives, and can m the suit. Plaintiffs would be jointly entitled to the pr of the suit, and as this technical objection was not ra the lower court, we submit that the judgment should disturbed.

CAMPBELL, C. J., delivered the opinion of the court.

Section 193 of the constitution of 1890 gives to an e of a railroad corporation a right of action in certain s case specifically defined by it, and, where death ensue a right of action to the "*legal or personal representati* the person injured.

We think a fireman on an engine and a telegraph o

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are engaged in different departments of labor, or "about a different piece of work," in the meaning of the constitution. An action for an injury resulting in death, based on the constitutional provision mentioned, must be brought by the executor or administrator of the decedent. The primary meaning of the term "legal or personal representative," is the executor or administrator, and there is nothing in the constitution to suggest that they were used in a different sense in the section under consideration. The constitution does not give the right of action it creates to parent or child or husband or wife, but to the executor or administrator.

Because the plaintiffs have no right of action, the judgment is reversed, and cause remanded.

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C. C. CHRISMAN ET AL. *v.* CITY OF BROOKHAVEN.

1. MUNICIPAL BONDS. *Separate school for whites. Const. U. S., 14th Amendment.*

The act of 1890 (Laws, p. 376), authorizing the city of Brookhaven to issue bonds in the sum of $15,000, of which $3,000 is for the use in building and equipping a school for colored children, and $12,000 for a school for white children, is not violative of the fourteenth amendment of the United States constitution.

2. CONSTITUTION 1869. *Free school-system. Other schools. Taxation.*

Under § 1, art. 8, const. 1869, requiring the legislature to establish "a uniform system of free public schools," while the legislature may not authorize a diversion of the common school-fund, it may empower local authorities to provide schools outside the established system, and to pay therefor by taxation. *Otken* v. *Lamkin*, 56 Miss., 758, distinguished.

3. SAME. *Local taxation. Equality and uniformity.*

Local taxation to pay bonds issued for the establishment of such schools is not violative of § 20, art. 12, constitution 1869, requiring taxation to be equal and uniform.

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Statement of the case.

4. LEGISLATIVE POWER. *Separate schools for whites. Const.* 1869, § 21, *a*

A legislative provision for the establishment, by a municipality, rate schools for whites and blacks, and the issuance of bonds the not violative of § 21, art. 1, const. 1869 of this state, which that "no public money or moneys shall be appropriated for an table or other public institution in this state making any dis among the citizens thereof; *Provided*, That nothing herein co shall be so construed as to prevent the legislature from appro the school-fund in accordance with the article in this constitutio ing to public schools."

5. CONSTRUCTION. *Constitution. Doubtful provision. Practical interpret*

In construing a constitutional provision, the meaning of which ca ascertained from the language used, the courts will consider t temporaneous, practical construction placed on it by the legislat public, and uniformly acquiesced in.

FROM the chancery court of Lincoln county.

HON. H. C. CONN, Chancellor.

By § 5 of "an act to amend the charter of the c Brookhaven," approved February 17, 1890, the boa mayor and aldermen of said city were authorized to bonds, in an amount not exceeding fifteen thousand d "for the purpose of purchasing a site and erecting th suitable buildings for the use of the public schools o city, and to purchase all necessary furniture, etc., fo schools." It further provided, that of the said bonds, might be used for the purchase of a site and the erect a suitable building for the free public school for colored dren, and the balance of the proceeds of the bonds sho used for said purposes for the white schools.

Other sections of the act provide for the levy of a s tax to pay the bonds and interest, and it is provided th title to the lot and buildings and apparatus so purcha acquired shall vest absolutely in the city. Power i conferred on the trustees of the public schools to lea the school-buildings for a series of years, provided the carries on the schools for at least ten months in each and free tuition is afforded the educable children of th

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on 9 of the act, in seeming conflict with § 5, provides
he proceeds of said bonds shall be used by the mayor
ard of aldermen for purchasing a suitable site, and
g thereon suitable buildings, for the white public
of said city."

s were issued as provided for by said act, for the pur-
building and equipping a separate school for whites
city, and a special tax was levied to pay the accruing
thereon.

bill was filed by certain resident tax-payers of the
king to enjoin the collection of the tax, their conten-
ng that the bonds are void, because so much of the
horizing the establishment of separate schools for
and blacks, and taxation to pay therefor, is violative
ourteenth amendment of the constiution of the United
and also of the constitution of 1869 of this state.

on 21, article 1, which it is claimed is violated by said
s follows: "No public money or moneys shall be ap-
ted for any charitable or other public institution in
te making any distinction among the citizens thereof;
d, That nothing herein contained shall be so construed
revent the legislature from appropriating the school-
accordance with the article in this constitution relat-
ublic schools."

ther provisions involved are those providing for the
hment of a uniform system of free public schools
t. 8), and for equality and uniformity of taxation (§ 20,

e from the alleged invalidity of the bonds on consti-
l grounds, the bill alleges certain irregularities and
duct on the part of the trustees in selling a portion of
ds, in selling some to persons interested as aldermen
tees, and in purchasing a site, the title to which is
l and in controversy. But, as these and other matters
do not affect the validity of the bonds and only re-
the conduct and management of the schools, and are

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Brief for appellants.

not insisted on in this court, it is not deemed necessary to state the case in any other aspect.

The court sustained a demurrer to the bill, and dismissed it, and from this decree complainants appeal.

R. N. Miller and *Nugent & Mc Willie*, for appellants.

The Brookhaven charter provides for a system of public schools wholly irreconcilable with the general system provided by the act of 1886 for all public schools in the state. The latter squares with the organic law; the former is a wide departure from it. It provides for a public school under the entire control of trustees, whose duties are nowhere defined in the charter or its amendments. We submit that, in view of the utterance of this court in *Otken* v. *Lamkin*, 56 Miss., 758, the act is unconstitutional in so far as it authorizes the purchase of grounds, the establishment of the school and issuance of bonds. The scheme provided by the act for leasing the school-building is wholly different from the constitutional scheme. If the act is maintainable, it overthrows the uniform system of free public schools.

We concede that a local tax to construct a *public* school-building is valid. *Daily* v. *Swope*, 47 Miss., 378. But it must be a school-house, constructed as a *common free school-building*, under art. 8 of the constitution.

We do not contend that the races may not be separately educated upon equal terms at public expense. This is to be commended. We, however, assume from the act itself that equal advantages are not secured to the colored children of the city. For this reason the act is violative of § 21, art. 1, const. 1869. This section refers to any moneys raised by taxation, whether in a city or in the state. The school-building is a "public institution," the charter makes the appropriation, and the money from taxation is "public money," and the exclusion of negro children is a "distinction among the citizens of the state."

The act also violates the fourteenth amendment to the con-

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stitution of the United States. See *Ward* v. *Flood*, 17 Am. Rep., 405; *Roberts* v. *Boston*, 5 Cush. (Mass.), 198.

Since the main and obvious scheme of the act of 1890 is to provide for the issuance of bonds and taxation for a public school for whites, and this is unconstitutional, the whole act must fail.

R. H. Thompson, for appellees.

Complainants cannot, in this suit, complain of any mismanagement of the school taught in the building, to pay for which the bonds were issued. The only matter involved is the validity of the bonds and of the tax. The argument for appellants is, that, while the races may be separated in public schools, this must be done as a matter of management, after buildings are provided; that when a public school-building is being provided and a tax levied, the real purpose—to separate the races—must be concealed or obscured. Of course, such a conception is without merit. The main controversy involved is too well settled to need argument.

H. Cassedy, on the same side.

The legislation under which the bonds were issued is in strict harmony with the general scheme provided for free public schools. It squares fully with the tests given in *Otken* v. *Lamkin*, 56 Miss., 758. The requirement that taxation shall be equal and uniform does not prohibit local taxation for local purposes. On the subject of the uniformity of the system of public schools, see *Bourdeaux* v. *Meridian*, 67 Miss., 304; *Wynn* v. *State*, *Ib.*, 312.

CAMPBELL, C. J., delivered the opinion of the court.

The single question for decision is the validity of the tax for the bonds issued by the town of Brookhaven, in pursuance of the act of February 17, 1890. There may be provisions of that act which cannot be sustained; but the only question involved in this case is the validity of the levy of taxes

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to pay interest on the bonds authorized by, and issued
the act mentioned; and that involves, as a primary in
the validity of the act authorizing the bonds. It is as
as violative of the fourteenth amendment of the consti
of the United States and of several provisions of the
constitution of 1869. The suggestion of violation
constitution of the United States is without force. Th
lation of the constitution of the state is said to consist
invasion of the scheme of a uniform system of free
schools, and of equal and uniform taxation througho
state provided for by the constitution, and disregard o
art., 1 of that instrument, which declares that "*no
money or moneys shall be appropriated* for any charit
other public institution in this state making any disti
among the citizens thereof; *provided*," etc.

The objection, on the ground of a disregard of the s
of the constitution as to a uniform system of free
schools, does not extend to the authorization to issue
to pay for a school-building, for it is certainly compet
the legislature to authorize a town to expend mone
raise it by issuing bonds for public school-buildings,
of and independent of the free public schools provid
by the constitution. It enjoins upon the legislature
tablish and maintain a uniform system of free public s
but does not prohibit the establishment of other schoo
side of its system; and the legislature may provi
schools at pleasure, not invading the constitutional s
As we held in *Otken* v. *Lampkin*, 56 Miss., 758, the l
ture may not authorize a diversion of the common
fund, provided for by the constitution, to the maintena
schools not within the system of free public schools,
support of which that fund was provided; but there
that case no support for the proposition that schools m
be established outside of the system provided for by th
stitution. The legislature has power to authorize sch
particular localities, to be maintained by taxation, and

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rize the procurement of the necessary buildings for s, and the issuance of bonds to pay for them; and this her an invasion of the constitutional scheme of uniform ublic schools, nor a disregard of the provision for equal niform taxation, which does not prohibit local taxation al purposes and benefits. As the legislature may law- provide for the establishment of schools, and the pro- ent of needed buildings and equipments, and raising to pay for them by selling bonds, as it may provide, ws that if there be in an act authorizing this, which it e right to authorize, one or more provisions as to the gement or support of the school provided for which be sustained because of conflict with the constitution, ould not make void the provision which the legislature e right to make, viz.; the procurement of a school- ng and equipments for the use of the community and le for school purposes. We do not say that the act review contains any provisions that are unmaintain- but, if it does, the provision for procuring a school- ng and equipments for the town, and issuing bonds to r them, is free from any legal objection by reason of ch feature. The main purpose of the act—*i. e.*, the es- ment of a school, and the procurement of needed con- ces for it—is not so connected with, or dependent on, ions for the management and support of the school as se the main purpose to fail, if the others must. The -house exists as a substantial reality, owned by the and if the school provided for by the act does not con- ith law, one which does will find the school-house a le place for it, we suppose.

remaining question is as to the effect of § 21, art. 1 of nstitution of 1869. Whatever the purpose and effect provision, it cannot be held to deny to the legislature ght to make separate provision for the different races matter of schools; and it was admissible for the legis- to authorize the establishment and maintenance of

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schools for whites and schools for negroes. If not, that has been done is violative of the constitution. practical interpretation of the constitution, begun soon its adoption and continued until it was superseded, fo the idea that this declaration of the constitution fo public support of separate schools for the different race literal interpretation of the section would prevent an a priation for a school or college for boys or girls, as such deny the establishment of institutions for the different or ages or conditions, except as expressly authorized b constitution. To hold thus would pronounce uncon tional all appropriations for the different universities schools of various kinds, other than the free public sc provided for by the constitution for males and females, or colored. The proviso to the section increases the diff of determining its meaning.

We confess we do not know what its purpose was. I not inhibit distinction among citizens on account of color or previous condition, although that was pron when the instrument came into being. It prohibits an tinction, on any ground, for any cause, no matter among citizens. It surely does not mean that. It is able that it was a mere platitude intended to announ general proposition for legislative observance, that eq and fairness must govern appropriations of public mon public institutions.

Despairing of ascertaining its meaning, we take refu contemporaneous, practical interpretation, which caus establishment of separate schools for the different race sexes, and appropriation of vast sums for their suppo may be that the section has reference only to appropri of money from the state treasury, and has no applicat local institutions suited to the varying needs of part localities.

We hold it to have been a lawful exercise of legi

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Syllabus.

to authorize the establishment of a school exclusively
ites, and to issue bonds as a means of doing it.
constitution of 1890 embodies, by express provision in
the rule which always prevailed in this state, that
ate schools shall be maintained for children of the
nd colored races," and the absurd provision of § 21,
of the constitution of 1869 is not in the new constitu-
Wherefore, our ruling accords both with past usage,
ally acquiesced in without question among our citizens
lasses, and with the recent deliberate expression of the
gn will on this subject.

Affirmed.

OF MISSISSIPPI, ON THE RELATION OF THE DISTRICT ATTORNEY, *v.* D. W. SIMMONS, ASSESSOR.

AMUS. *Assessment. Property escaping taxation. Code* 1880, §§ 486, 509, 513.
ion 486, code 1880, requires the assessor to assess property that has es-
ped taxation in former years. Section 509 authorizes him to add
operty to the roll after returning it to the board of supervisors, and
fore final action thereon. After that, by § 513, the *collector* is required
assess all property left unassessed. Under these provisions it is the
ty of the assessor, at any time, to assess property that has escaped
xation for former years. This he may be compelled to do by man-
mus, and it is immaterial that when the suit is brought the time has
ssed for him to make assessments for the current year.

PTION FROM TAXATION. *Charter strictly construed.*
words of a charter are to be considered rather as those of the incorpo-
tors than of the state. Exemptions from taxation must be found in
e language employed, construed most favorably to the state. An ex-
ption not clearly given, or existing by necessary inference, cannot be
lowed.

Provision in charter not a contract. Taxation of capital stock.
rovision in the charter of a corporation that the "real and personal
operty of said company shall be subject to the same taxes, and to be

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Syllabus.

assessed and collected in the same way that the real and personal erty of individual citizens is assessed and taxed, and not other cannot be construed as a contract that the capital stock of the cor tion will never be taxed.

4. TAXATION OF CORPORATION. *Value of capital stock.* *Code* 1880, § 498.

In assessing a corporation for former years in which it has escaped tion, under § 498, code 1880, the par value of the capital stock controlling. The same is to be assessed "at its market value." Ac profits, the franchise, real and personal property, and other facts fecting the value of the stock, are to be considered. The assessme ing made *nunc pro tunc*, the subject and the burden are to be consi just as they would have been if the assessments had been made proper time.

5. SAME. *Taxes paid on property. Deduction therefor.* *Code* 1880, § 498.

The Mississippi Mills, an incorporated company under the laws o state, is within the terms of § 498, code 1880, which provides for t the capital stock of any "bank or other joint-stock company;" an paid taxes on its stock for former years are collectible, notwithsta the fact that it has paid taxes on its real and personal property for years; but the value of the property so paid on is to be deducted the valuation of the capital stock. If the value of the property pa was duly ascertained, it is conclusive.

6. PROPERTY EXEMPTED. *Valuation of stock reduced.* *Laws* 1872, *p.* 65; 1882

Although it is the capital stock, not the property as such, of the cor tion that is taxable, if it was embraced by the act of 1872 (Laws, or the act of 1884 (Laws, p. 84), exempting from taxation certain erty used in manufactures, effect will be given to said acts by all the corporation, in paying back taxes, to deduct the value of the erty so exempted from the value of its capital stock

7. EQUALITY OF TAXATION. *Restricting words of statute. Construction.*

Unless plainly expressing a different purpose, a statute will be con as intended to levy a single tax upon property, though the words law would naturally bear a broader meaning. The courts will, as possible, without doing violence to the language used, restrain the ing of a statute apparently authorizing double taxation.

8. TAXATION OF STOCK. *Domestic corporation. Share-holders not taxable.*

Under our statutes a domestic corporation is taxable with the value capital stock, and individuals are not taxed on the shares of such held by them.

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Brief for appellant.

FROM the circuit court of Copiah county.
HON. J. B. CHRISMAN, Judge.

R. N. Miller, for appellant.

The law requires that when an assessor shall discover that any person or property has escaped taxation for former years, he shall assess such person or property. Code 1880, § 486; Code 1892, § 3768. The president or cashier of any bank or other joint-stock company liable to taxation is required, on or before the first day of June every year, to deliver to the assessor of the county a written statement of the stock paid in, and its market value. Code 1880, § 498; Code 1892, § 3758.

Section 468, code 1880, which is also carried forward in the new code, specifies that certain property, *and no other*, shall be exempted from taxation, and the exemption does not include the capital stock of corporations.

Section 484, code 1880, which is § 3751, code 1892, providing for assessment-rolls, requires that there shall be a heading for "amount of stock or shares in any corporation or company."

Sections 472, 473, code 1880, requires the stock of all corporations to be taxed, unless the same is exempted by law.

From the above provisions, the clear legislative intent to tax corporate stock is deducible. All property in the state is taxable, unless expressly exempted. Taxation is the rule; exemption is the exception. *Railroad Co.* v. *Thomas*, 65 Miss., 553; Cooley on Taxation, 204; Burroughs on Taxation, 132.

There is no intimation by the legislature of exemption to the Mississippi Mills of its stock or shares. On the contrary, the thirteenth section of the charter requires that its real and personal property shall be subject to taxation.

Certain property of manufacturing companies was exempted at different periods, *but never their stock.* Laws 1872, p. 65; Laws 1882, p. 84; *Mississippi Mills* v. *Cook*, 56

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Miss., 40. As the state, in charity, exempted part of its p
erty for stated periods, the contention is, now, that it was
der some sort of contract to give the appellee the tax o
stock.

Taxation of its property against the corporation, and
ation of the stock against the share-holders, is not dupli
taxation. The capital is owned by the corporation, w
the shares are owned by individuals. Burroughs on T
tion, 170, 171; *Ib.*, 178, 185; *Van Allen* v. *Assessors*, 3 W
573; 4 *Ib.*, 244. See also Cooley on Taxation, 169, 176 *et*
1 Cush., 142; 2 Jones' Eq., 396; 21 N. J., 449; 26 *Ib.*,
39 Pa., 251; 42 *Ib.*, 42; 47 *Ib.*, 106; 39 Ill., 130; 12 A
75; 9 Yerger, 490; 18 Wall., 206; *Attala Co.* v. *Kelly*
Miss., 40.

No system of taxation has ever been devised which
not result in apparent double taxation in some form.
will be true until the science of government reaches perfect
but taxation is not valid because it results in imposing
equal burdens. See Cooley's Con. Lim., 513; 90 Am. I
149; 23 Am. R., 461; 32 *Ib.*, 688; 33 *Ib.*, 688.

If it be true that corporations are not embraced by §
code 1880, the owners of shares are taxable under the ge
revenue law, especially § 473. On this point see Burro
on Taxation, 155.

It is manifest, when we look at the whole scheme of
revenue system, taking §§ 468, 472, 473, 474, 498, code 1
all together, that the legislature intended to embrace co
rations, and that it never intended to limit taxation to sh
of technical joint-stock companies. A joint-stock comp
is taxable under the statute as a company incorporated.
Mass., 531.

The state may tax the property of the corporation o
franchise, and at the same time the shares of its stock to
holders thereof. Cooley on Taxation, 43, 44, 164, 274; I
roughs on Taxation, 90.

The state may tax non-resident holders by making

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Brief for appellee.

corporation its collector. Cooley on Taxation, 433, note 1; 3 Am. R., 407. The *situs* of shares of stock is always where the corporation is located. 1 Potter on Corp., §§ 189, 193; Burroughs on Taxation, 189; Cooley on Taxation, 43, 44, 274; 4 Am. St. R., 752; 23 Am. R., 460; 9 Wall., 353; 19 *Ib.*, 490; 49 Ill., 318; 2 Gill., 487; 25 Ohio, 1.

I call special attention to the fact that by § 9 of the charter of Mississippi Mills it has a lien on all stock for any debt of the share-holders to the corporation. On this point see Potter on Corp., § 267; Beach on Railroads, §§ 390, 393.

The constitutional provision that taxation shall be equal and uniform, does not affect the right of the state to tax the corporation on its property and the share-holders on the stock. Cooley on Taxation, 124, 132, 144, 174; Burroughs on Taxation, 22, 61, 71.

If the taxes cannot be collected until assessed, the assessor should be compelled, by mandamus, to make the assessment.

J. S. Sexton, for appellee.

1. The petition in this case was filed October 6, 1891, at which time the assessor had no power to add to or to take from the roll. Section 509, code 1880, was the only authority for the assessor to add any thing to the roll after its return. By § 513 it was provided that after the roll had passed from the hands of the assessor and been approved, the collector should assess and collect taxes on property left unassessed. Mandamus will not lie to compel the doing of an act which the officer is not under obligation to perform. High's Ex. L. Rem., 35, 39.

Nor will it be granted to compel the performance of an official act when substantial doubt exists as to the duty to perform it. *Ib.*, 40 It is always a complete answer that the respondent has no authority to do the act. Cooley on Taxation, p. 726.

2. To tax the property of the Mississippi Mills, as provided by the charter, and also tax the shares of stock, would

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manifestly be duplicate taxation, which is never allowed u
less plainly required by legislative enactment, and there
no such enactment in this state. There is a sort of indir
taxation, which is admissible, and which, in one sense,
duplicate taxation, as where the duplicate tax is paid by d
ferent parties. A construction of tax laws will not
adopted which will subject the same property to be tw
charged for the same tax, unless required by the expr
words of the statute, or by necessary implication. Coo
on Taxation, p. 227. Courts do their utmost to prev
double taxation, and will construe a statute so as to avoid su
result. Cook on Stockholders, § 567, and authorities cite

The shares of the stock of Mississippi Mills cannot
separated from the property of the company or its capi
without embracing the shadow and rejecting the substan
The shares have no value, except that they represent so mu
of the capital of the corporation. Whatever technical d
tinction may be drawn between taxing a stockholder on
count of his interest, and taxing the corporation on accou
of its property, the result is the same.

By duplicate taxation is understood the requirement t
one person or subject shall directly contribute twice to t
same burden, while the other subjects of taxation, belong
to the same class, are required to contribute but once.
do not see how a tax on a merchant's stock, distinctively
value, can be supported when, by the same authority,
same stock is taxed as a part of his whole property. T
same may be said of the tax on the property of a corpo
tion, and also on the capital which is invested in the pr
erty. Cooley on Taxation, p. 225.

It will be seen that § 468, code 1880, does not undertake
tax any thing, but contains the exemption of certain pr
erty. Section 473 of said code has no application, beca
the Mississippi Mills is neither an "incorporated bank"
"other company," within the contemplation of that statu
When there are general words following particular or s

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Brief for appellee.

words, the former must be confined to things of the kind. Sutherland on Stat. Con., § 268; 63 Miss., 600. es, this section only provides the place where stock be taxed, if taxable at all.

tion 478, code 1880, not only fails to contain any pro- hinting at an assessment of this stock, as such, but ns a clear intimation that such stock is not liable to on.

tion 498 can have no application, for the reason that ississippi Mills is neither a bank nor joint-stock com- It is a corporation pure and simple. See Cook on holders, § 544; Anderson's Law Dic., title Joint-stock anies; 2 Lawson on Rights, Rem. & Prac., p. 1281.

ain, the "joint-stock companies" referred to in said sec- under the rule of construction mentioned, must be con- to companies of the same nature as banks. *Ice Co.* v. *ville*, 69 Miss., 86.

nt that taxation is the rule, and exemption the excep- *double taxation* is not the rule, and exemption from it is e exception. Appellee being required to pay taxes on operty, and all such taxes having been paid, no statute e pointed to under which the stock of the corporation able as such. The statutes referred to by counsel do uthorize this, and, if a statute could be found which l, the same would be plainly unconstitutional.

Under the laws of this state, approved April 1, 1872, 17, 1873 and March 9, 1882, all the property of appellee ced in the contemplation of such laws was exempted taxation; and, the property being exempt, the shares of tock, which represent the property, are also exempt. etition admits that appellee has paid taxes on its prop- able to taxation. Whether an exemption of corporate rty from taxation exempts its capital stock, depends y on the words used in the statute. See Cook on Stock- rs, § 568. The words used in the act of 1872 were as as the English language contains.

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Brief for appellee.

It has been decided that an exemption of the corporation from taxation, either on its franchise or capital stock or property, exempts, by implication, the shares of stock. 23 N. J. L., 484, 532; 7 Dana (Ky.), 338; 17 Ind., 48; 3 How. (U. S.), 133; 22 Fed. Rep., 75.

Where the shares of stock are exempt, it is held that the property of the corporation is also exempt. Cook on Stockholders, 568; 3 Zabraskie, 484; 4 *Ib.*, 402; 3 How. (U. S.), 133; 95 U. S., 104, 679; 31 Com., 106; 40 *Ib.*, 491; 21 Gratt., 604; 6 Gill., 288.

4. Under the thirteenth section of its charter the capital stock of appellee could never be assessed. This provides how its property shall be assessed, and constitutes an inviolable contract on the part of the state. 52 Miss., 127; 53 *Ib.*, 246; Cooley on Taxation, 71.

Notwithstanding the provision of the constitution that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals, it is competent for the legislature to contract with a corporation, as it did in this case, that its property shall be subject to the same taxes as the property of individual citizens, and not otherwise. There is nothing in the case of *Mississippi Mills* v. *Cook* to suggest a want of power on the part of the legislature to make any sort of an agreement with the corporation in reference to the method or manner of its taxation.

By comparison of § 3 with the preamble of the charter of appellee, it will be observed how literally true it is that to tax the property of the corporation, and then to tax its shares, would be duplicate taxation, and violative of the thirteenth section above referred to.

5. Under §§ 112, 181 of the constitution of Mississippi it was not permissible to tax the real and personal property of appellee, and tax its shares and stock also. Legislation attempting to do this would be violative of these constitutional provisions. *Frederick Co.* v. *Bank*, 48 Md., 117; *San Francisco* v. *Mackey*, 21 Fed. Rep., 539; *Burke* v. *Badlans*, 57 Cal.,

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594. I call special attention to the fact that the constitutions of California and Maryland, construed in these cases, are similar to our own, as explained in the opinions of Judges Campbell and Simrall in *Mississippi Mills* v. *Cook*. It is useless to discuss decisions from courts of other states where the statutes and constitutional provisions are entirely different.

There is an effort on the part of opposite counsel to so distort § 498, code 1880, as to hold that it requires the assessor to assess the corporation for all its shares of stock, less the shares owned by Oliver's estate, and make the Mills collector of the same by having it pay the taxes, and charge the same on the shares of stock to the respective holders. It is sometimes thought proper to fix the *situs* of the shares at the domicile of the corporation, in order to reach the shares of stock for the purpose of taxation. It is impossible to make this statute serve such purpose, because it is not applicable to the case in point, and no statute would be valid which undertook to tax the shares anywhere, when the property, in which the capital represented by such shares had been invested, was already taxed in another form.

COOPER, J., delivered the opinion of the court.

On the sixth day of October, A.D. 1891, the state, upon the relation of its district attorney, exhibited its petition for mandamus against W. T. Matheney, who was then assessor of Copiah county, to compel him to place upon the assessment-rolls of the county for the then current year, as the property of William Oliver, deceased, forty-three shares of the capital stock of the Mississippi Mills, an incorporated company doing business in said county, and to assess to the said company 301 shares, the same being the balance of the stock in said company; and also to return said stock as the property of said estate of Oliver and of the company, which had escaped taxation for the ten years next before the year 1891. The petition alleges that said stock is, and during all

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the time for which it is sought to have it assessed has b of the par value of $1,000 per share, but of the actual ma value of $5,000 per share. It is further averred that Will Oliver, during his life, was the owner of forty-three sh of said stock on which no taxes have ever been paid, that no officer of the said company ever made out and d ered to the assessor a statement of the number of the sh of the stock, and its market value, as by law they were quired to do.

The prayer of the petition is that a mandamus may i to the assessor, commanding him to assess the estate of W iam Oliver with the market value of forty-three share the capital stock of the Mississippi Mills, and to asses the company its whole stock of 344 shares, less the fo three shares assessed to the estate of Oliver.

By the act of incorporation of the Mississippi Mills capital stock was fixed at $250,000, with the right of stockholders to increase it to $1,000,000.

The thirteenth section of the charter is as follows: "T the real and personal property of said company shal subject to the same taxes, and to be assessed and colle in the same way, that the real and personal property of dividual citizens is assessed and taxed, and not otherwise

By an act of the legislature, approved April 1, 1872 (L p. 65), it was recited that great advantage would accru the state by the encouragement of manufactories; and that end, it was provided that the state would exempt f taxation for the period of ten years all companies not t in existence, whose capital stock should be not less t $10,000 paid in; and by an act, approved April 17, 1873, provisions of the act of April 1, 1872, were extended to Mississippi Mills, and made a part of its charter.

The following are some of the provisions of law in re ence to taxation as found in our codes:

"The president and cashier of any bank in this state other joint-stock company, the capital stock of which is

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shall, on or before the first day of June in every year, r to the assessor of the county in which said bank or any is located, a written statement, under oath, of the l stock paid in, and its market value, except such as is able to be taxed; and, on failure to furnish such state- the tax shall be assessed on the whole capital author- y the charter." Code 1880, § 498; Code 1892, § 3758.

ll incorporated banks or other companies liable to taxa- n their capital stock, shall be assessed for said stock in unty in which the principal office or place of transac- of business is situated; and, if there shall be no such or principal place of business, then in the county or ies in which the business of such company shall be car- n." Code 1880, § 473; Code 1892, § 3750.

When the assessor shall discover any persons or property have escaped taxation in former years, he shall assess persons and property for such former years, distinctly ying the fact of such escape and discovery by him on e or pages of his assessment-roll, separate from the as- ent for the current year." Code 1880, § 486; Code 1892, 3.

When the assessor shall assess for a former year, he shall notice in writing thereof to the person assessed or whose rty is assessed, if such person is a resident of the y." Code 1880, § 487; Code 1892, § 3769.

he assessor, after returning his roll, may add any per- r thing to it at any time before action by the board." Code 1880, § 509; Code 1892, § 3800.

he collector shall assess and collect taxes on all land to taxation left unassessed by the assessor, and on all that may become liable to taxation before the next sment;' and he shall also assess such other persons and rty as he may find unassessed by the assessor." . . . 1880, § 513; Code 1892, § 3804.

its meeting in August, the board of supervisors is re- d to examine the assessment-roll, to hear all objections

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thereto, and, when corrected, to approve the same. 1880, § 503; Code 1892, § 3788.

The assessor demurred to the petition on many grou which will be noted in their order. The demurrer was tained and the petition dismissed, and, from that judgn the state appeals.

The first objection argued by counsel in this court third in order of the grounds of demurrer) is that the tion asks that the assessor may be required to perforn act which he has no legal power to do. The positio counsel on this question may be briefly stated, thus: assessor may add to his roll for the current year any pe or thing found to have been omitted at any time befor tion by the board of supervisors. Code of 1880, § 509. the board was required by law to complete its examin of the roll at its August meeting, and it must be presu to have done so. The petition was not filed until Octob at which time the roll for the current year had passed the control of the assessor, and it was then the duty o collector, and not of the assessor, to add persons and p erty to the roll. Code of 1880, § 513.

The sufficient reply to this objection is that the pet also sought to compel the assessor to perform a duty w yet rested on him—that of assessing the capital stock o corporation which had escaped taxation for antecedent y

The demurrer was, in this view, too broad, and sh have been disallowed, if not sustainable on other grou But this ground of demurrer is not greatly relied upo the appellee.

The defense principally relied on is that the corpor has already been taxed upon its real and personal prop and cannot be assessed with its capital stock for taxatio the following reasons: 1. Because it is protected by its ter from taxation of its capital stock. 2. Because a tax its property and also upon its capital stock would be d taxation, and, as such, obnoxious to those provisions o

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ution providing for equality and uniformity of taxa-
The contention of counsel is that, by the thirteenth
of the charter of the company, an inviolable contract
ntered into between the state and the incorporators
e capital stock of the company should never be sub-
to taxation, but that the limit of taxation should be the
d personal property, assessed and taxed as the prop-
f individual citizens should be assessed and taxed.
nmunity claimed, if it exists at all, can be found only
rained inference, or by an interpretation of the char-
war with the settled and universal rules of construc-
plicable to legislative grants.

rule is well settled that the words of a charter are to
sidered rather as those of the incorporators than of
te; that exemptions, when claimed, must be found to
rom the language employed, construed most strongly
t the party and most favorable to the state, and that
emption not clearly given, or existing from necessary
nce, can be allowed. Counsel assumes that the words
nd personal property," used in the thirteenth section
charter, mean real and personal property other than
pital stock or franchise of the corporation; and, hav-
us excluded these from liability to taxation as real or
al property, finds an implied exemption of it from
on upon the rule that the legislature, having stipulated
e real and personal property should be taxed, thereby
the state not to tax the franchise. This construction
the rule *expressio unius est exclusio alterius* beyond all
able limits, and its application would be to subvert or
the fundamental principles of construction of char-
We find nothing in the charter precluding taxation of
pital stock of the company.

eems to be conceded by counsel for appellant that the
tive purpose is and has been to tax both the capital
of the company and also its real and personal property,
is argument is addressed to the right of the state to

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tax not only the property of the corporation and its s
but, in addition thereto, to tax the shares of the stock
stockholder. Our examination of the statutes has le
conclusion which renders unnecessary a consideration
question of the existence of this power. Whether the
does or does not exist, the rule of construction is uni
that no such purpose is to be attributed to the state; a
prevent such results, the courts will, as far as possible,
out doing violence to the words of the law, restrain
provisions of statutes as apparently authorize a
burden to be laid upon the same property or pe
Keeping constantly in view the justice of equality of
tion, and assuming the legislative will to be that no
result shall be reached by the plan it provides, the
have uniformly construed revenue acts, unless unequiv
and clearly expressing a different purpose, as intend
levy a single tax only upon the same property, even t
the words of the law would ordinarily and naturally
broader and more general meaning. In *Bank* v. *Nash*
N. H., 389, the rule is well expressed as follows: "I
fundamental principle in taxation that the same pr
shall not be subject to a double tax, payable by the
party, directly or indirectly; and when it is once de
that any kind or class of property is liable to be taxed
one provision of the statutes, it has been held to follow
legal conclusion, that the legislature could not have int
the same property should be subject to another tax, t
there may be general words in the law which would se
imply that it was to be taxed a second time." In *S*
Burley, 9 N. H., 423, this rule of construction was appl
a case where the property of a corporation was taxa
the corporation in the town where it was situated, a
attempt was to collect a tax assessed on a stockholder
town where he resided, under the provision of a s
which made stockholders in corporations liable to be
for their stock in the places where they resided. The s

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n force provided that "all stock in any corporation or
ıny on which any income was received, or any dividend
should be taxed to the owner in the town where he
d." It was held, notwithstanding these general terms
ıg the stock taxable to the stockholders, that, inasmuch
property of the corporation was legally taxed to the
ration under the law then in force, the stockholder
not be taxed for his stock in the place where he re-
because that would indirectly amount to a double tax-
of the same property." The decision in the case from
we have quoted held that, when the corporation was
on its capital stock, it was not competent for the legis-
to tax the stockholders on their shares—a conclusion
ecessary to approve, as the question is not here involved.
the rule of construction to prevent double taxation,
decisions are collected in Cook on Stock and Stock-
rs, § 568, note 1. The subject of taxation of corpora-
and the stockholders therein, is full of subtle distinc-
not necessary to be encountered in this case; we shall
fore content ourselves with keeping near the subject of
ıquiry.

r laws do not now provide, and have never provided,
etailed and elaborate scheme for taxation of corporate
rty, such as may be found in some of the other states,
ly New York, Pennsylvania and New Jersey, doubtless
se they are few in number in our state, and of but
relative wealth. With the exception of those provis-
which relate to taxation of banks and railroads, and
which relate to privilege taxes, §§ 3750 and 3758, code
comprise our whole law on the subject. It is some-
difficult to perceive the precise purpose of the plan of
ion thereby provided; it is certain that its details are
xpressed, but must be found from inferences drawn from
al principles. The original of § 3750 is found in the
f February 20, 1840, and that of § 3758 in the act of
h 5, 1846. Hutchinson's Code, pp. 177, 197.

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Opinion of the court.

As originally enacted, our present § 3758 read as follo
"The president or cashier of any bank, the capital stoc
which is taxable, shall, on or before the first day of Ma
each year, deliver to the assessor of the county in which
bank is liable to be taxed, a written statement of the ca
stock actually paid in, or secured to be paid in, except
stock as is held by the state or some incorporated literar
charitable institution, which statement shall be verifie
the affidavit of the president or cashier of such bank."

In the codification of our laws in April, 1857, the requ
ment was that the statement should be of the capital s
paid in, instead of that paid in or subscribed, and the ex
tion was of such stock "as is held by the state, or other
not liable to be taxed." Code 1857, p. 77, art. 24.

In the codification of 1871, the section was extended s
to include banks and "other joint stock companies." C
1871, § 1683.

In the code of 1880, the exception of stock "held by
state, or otherwise not liable to be taxed," was changed s
to read, "such as is not liable to be taxed," and the ma
value of the stock, instead of its par value, was fixed as
basis of taxation. It thus appears that the exemption of
statute could be claimed only when the *stock* of the comp
was by law exempted to the company, or the shares of st
to the stockholders.

Under the law as it stood prior to the code of 1880,
stock of the company was the subject of taxation,
whether its value had increased or diminished, by investm
or loss, the basis remained unchanged. This was taxa
of the stock, purely and simply as stock. But by the c
of 1880 a marked change was wrought, for while the w
stock continued to be used, other considerations, by wh
its value was determined, were brought into view. The
crued surplus or profit, the franchise of the corporation,
whatever other things which gave value to the stock, w
added as factors in determining the basis of taxation.

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f the value of the stock had been, from any cause, di-
ied, that fact was to be considered, and due allowance
in its valuation.

Farrington v. *Tennessee*, 95 U. S., 679, illustrations are
of the different phases which taxation of corporations
ssume. Thus, there may be taxation (1) of its fran-
(2) of its accumulated earnings; (3) profits and divi-
; (4) real estate; (5) deposits in banks; (6) capital
yed; (7) on circulation.

ugh, as we have said, the details of the plan of taxing
ations are left somewhat uncertain by our laws, it is
is that the purpose is to tax under the comprehensive
ation of corporate stock, at its market value, all species
perty owned by the corporation, whatever enters as a
in determining its value. It is also evident that taxa-
f its real and personal property in specie is not taxa-
f all the various elements of value, for this would ex-
in all cases the value of the franchise, and also its
ments in securities of a non-taxable nature. On the
tated in the petition, the stock of the Mississippi Mills
perty which has escaped taxation, within the meaning
law, and it was the duty of the assessor, upon discov-
that fact, to assess it as such, and make proper return
board of supervisors.

t we may not be misunderstood, we will note here that
eak with reference to a subject of taxation omitted by
sessor, and not considered by the board of supervisors.
things taxed—the real and personal property of the
ny—comprised its capital stock, the mere change of
nclature would not carry liability to an additional tax
pen the door to a reconsideration of the value of the
rty. Values, when fixed by the conjoint action of the
and the constituted authorities, cannot again be made
bject of controversy between the state and the citizen,
e definitely and conclusively fixed by the final action
the assessment-rolls according to law.

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It is the fault not only of the assessor, but of the r
that return was not made of its capital stock for taxa
as required by law; and that its real and personal prop
was assessed and taxed is not a sufficient reply to the der
of the state that its stock shall now be assessed, as it sh
have been through all the years in which it has escaped

It is proper and important to consider what rule sh
apply in the assessment of the stock for taxation.

1. It is to be noted that assessments of the character
under consideration are made *nunc pro tunc*. The prop
and the burden are to be considered just as they would
been if the assessment had been made when it should
been. The valuation of the property should be accordi
its value at the time when it ought to have been asse
and the tax imposed is that which then should have beer
lected.

2. The assessment heretofore made of the real and per
property of the company should be deducted from the v
of the stock, for, as we have said, they constitute facto
determining its value; and, having been once assessed,
tion of it again, under the name of the stock, would be d
taxation. For, though the legislature might have levied
an *ad valorem* tax and a privilege tax upon the company,
levied is an *ad valorem* tax, and it is not to be presumed
the legislative purpose was to tax the same property tw

In many of the states where corporate stock is assesse
is provided that there shall be subtracted from its real v
the assessed value of its real estate. Under such statute
danger of a double assessment is obviated. While our
contains no such provision, we can perceive no more s
factory or certain process by which the legislative pu
can be carried into effect, nor is there any reason wh
assessor and supervisors may not resort to it in determi
the taxable value of the stock.

Another objection made by the appellee is that, unde
acts of 1872 and 1873, above noted, all the property o

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any was exempt from taxation for a period of ten years, under that of 1882, all additions exceeding in value 00 was exempted for another period of ten years. But, as the record discloses, the exemption claimed under ct of 1872 has long since expired, and that claimed the act of 1882 has never attached. If, upon a dis- of all the facts, it shall appear to the officers that the to the exemption exists, it would be proper to give to it in the valuation of the stock of the company. It e that, by the acts referred to, it is the property of the any which is exempted, while, under the revenue act, it at is called the stock that is taxed. Under some cir- ances, these terms may be construed as referring to dis- things, and an exemption of the property, as such, from on would not preclude the legislature from imposing a ege tax upon the company, whether graded by the of its stock, or of its property, or by any other ard. But, as we have said, the words of our statute, l stock at its market value, includes not only the fran- of the corporation, but also its property of all descrip- and the taxation intended is taxation of property and a privilege. Our statute, as we have shown, has ex- for many years, and is, of course, of general applica- and when specific exemptions have been granted, either ecial acts or by general provisions, intended to displace of the revenue act, effect should be given to them. It t be doubted that general laws, subjecting all property rporations or individuals to taxation, should be con- d by other statutes, either general or special, which nce a clear purpose that certain property, under certain tions, should not be taxed, and upon the same principle atute under consideration should be so construed.

unsel for appellee finally contend that the Mississippi is not a "bank or other joint-stock company," and is fore not within the terms of the law. This construc- is too rigid, and would practically nullify the statute.

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Syllabus.

All corporations have stock, but some associations not corporations have also. The term "other stock companies" was used to include all associations having stock, and not to exclude those having stock which are also incorporated.

We observe that much we have said as to this proceeding is advisory merely, for by mandamus the judicial discretion of the officer cannot be controlled. He can only be compelled to act. If, in acting, mistakes of judgment occur, they must be corrected in another proceeding.

It remains only to be said that Oliver, in his life-time, and his estate now, are not taxable with the value of his shares in the stock of the company. Stock in domestic corporations is taxable under the provisions of law we have been considering, and it is not contemplated that the share-holder shall be again taxed with so much of it as he owns individually. There is no express declaration of law that he shall be, and the presumption is that, having been taxed once to the company, it shall not be taxed also to the share-holder.

The judgment is reversed.

BANK OF OXFORD *v.* TOWN OF OXFORD.

1. BANK. *Privilege tax. Act of* 1888. *Exemption from taxation.*

Under the revenue act of 1888 (Laws, p. 16) a bank that failed to pay a *sufficient* privilege tax, measured by its capital stock and assets, was not entitled to exemption from other taxes—state, county and municipal. *Vicksburg Bank* v. *Worrell*, 67 Miss., 47.

2. TAXATION OF BANKS. *Code* 1880, § 498. *Repeal. Acts of* 1886 *and* 1888.

Neither the revenue act of 1886 (Laws, p. 12), imposing a privilege tax on banks, nor the revenue act of 1888 (Laws, p. 16), providing that payment of the privilege tax therein imposed should exempt from all other taxes, abrogated § 498, code 1880, which provided for taxing, at its market value, the capital stock of banks. Said section remained in full force, inoperative if the act of 1888 was complied with, but operative if it was not.

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Statement of the case.

K. *Taxation. Payment of insufficient privilege. Code* 1880, § 498.

cordingly, where a bank failed to pay a sufficient privilege tax under he said act of 1888, its capital stock remained liable to taxation as pro-ided by § 498, code 1880.

KING CORPORATION. *Taxation of shares. Code* 1880, § 498.

der § 498, code 1880, and all former codes in this state, the property and ssets of banks and other joint-stock companies are not taxable as those f individuals. They are not required to report to the assessor indebted-ess due them, money on hand or on deposit, or other assets, but only he value of the shares of capital stock paid in. Thus, through the cor-oration as a medium, such shares are taxed, and an individual share-older is not required to give in his shares of stock for separate taxation.

ATION OF CAPITAL STOCK. *Non-taxable securities. No deduction therefor.*

ares of the capital stock in a bank are taxed through the bank, regard-ess of how the capital is invested. Hence, a bank in reporting its capital tock for taxation must give it in at its market value, and cannot deduct herefrom the amount of its capital or assets invested in non-taxable ecurities.

ILEGE TAX. *Failure to pay. Relief against. Act of* 1892.

here a bank did not pay sufficient privilege tax under the act of 1888, ts consequent failure to secure exemption from all other taxes cannot e relieved against by availing of the act of 1892 (Laws, p. 31), granting elief on certain terms to those delinquent as to privilege taxes. The atter act relates only to the enforceability of contracts made by such elinquents.

M the chancery court of Lafayette county.

. W. R. TRIGG, Chancellor, presided by interchange.

pellant, Bank of Oxford, filed this bill May 15, 1890, to an action at law which had been instituted against it e town of Oxford for the collection of unpaid munici-xes for the years 1888 and 1889.

bill alleged that the bank had paid for each of those a privilege tax of $750; that this was the proper tax, ts capital stock was $79,000, and its surplus $4,000—$83,000—while $10,000 of this was invested in non-e state bonds; that the basis for the estimation of its ge tax was thus reduced to $73,000; that afterwards,

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a doubt having arisen as to the construction of the st
the bank, as a matter of precaution, and for the purp
placing the question of the amount to be paid beyon
doubt, tendered to the sheriff an additional sum of $25
interest thereon, for each of said years, which the sheri
fused to accept. This additional sum complainant stil
ders in its bill.

The town answered, denying the sufficiency of the
lege taxes so paid, and denying that the bank had the
to deduct the $10,000 invested in non-taxable bonds in
puting the basis of the privilege taxes so paid. The a
avered that during the years in question the assets
bank ranged from $175,000 to $225,000, and that it s
have paid the privilege tax for each year as a bank h
that amount of assets. The answer was made a cros
and prayed for an accounting as to the value of the c
stock and the assets for each year, and that whichev
found the larger be adopted as the basis on which t
mate the privilege taxes chargeable against the bank.
cross-bill further alleged that as the bank had paid an
ficient privilege tax, it had failed to secure the exem
from all other taxation—state, county and municipal—
vided for by the revenue act of 1888 (Laws, p. 16); and t
fore the cross-bill prayed for a decree for the amount
ad valorem municipal taxes.

The bank answered the cross-bill, repeating its or
averments, and denying that its assets amounted to an
sum as that alleged in the cross-bill, alleging that the
and discounts made by it were largely made up of m
due depositors; that prior to 1888 it had invested $6,
its capital stock in real estate, which had been assessed
on which it had paid *ad valorem* taxes for the years in
tion; that the basis upon which it had paid privilege
was found by adding to the whole capital the reserve
and then deducting the non-taxable bonds and real esta

From the undisputed testimony it appeared that fo

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Statement of the case.

all the resources of the bank, including loans and discounts, real estate, cash on hand etc., aggregated $207,559.92; that as against these resources the capital stock amounted to $79,000, the undivided profits to $4,043.32, the amount due depositors $124,516.60. The totals for the year 1889 varied very slightly from those of 1888. It was further shown that the municipal taxes for 1888 were ten mills, and for 1889 fourteen mills, on the dollar.

At the May term, 1892, the case being ready for hearing, complainant asked leave to file an amended bill, setting up the act of March 7, 1892 (Laws, p. 31,, granting relief from penalties incurred by failure to pay privilege taxes. This act provides that any person or corporation liable to a privilege tax, and having failed in whole or part to pay the same, might, within sixty days after the passage of the act, pay the true amount or the balance remaining unpaid, with twenty-five per cent. additional; that persons or corporations making such payments shall "be relieved from all the pains and penalties imposed by § 589 of said code 1880, or any law of like import in respect of the effects of such non-payment of such privilege tax on contracts made by such persons or corporations; and all contracts made by such persons or corporations as shall avail themselves of the benefits of this act shall be enforceable in all the courts, the same as if such privilege taxes had been paid when the same were required by law to be paid." Complainant, by its proposed amended bill, sought to show compliance with said act, and to avail of its provisions as granting relief against the demands asserted by the town. The court refused to allow the amended bill to be filed.

On final hearing, the court held that the bank had failed to pay sufficient privilege taxes for the years 1888 and 1889, and that it was, therefore, liable to pay the municipal taxes *ad valorem*, and directed an account to be taken of the gross assets held by the bank on the first of February in each of said years, less the non-taxable securities and the deposits,

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Brief for appellant.

on which basis ten mills for 1888 and fourteen mills for 1889 should be calculated; that the sum so ascertained should be credited with the amount of municipal taxes paid on the real estate for said years, and the balance thus ascertained, with six per cent. interest thereon, should be reported as the amount for which a decree would be rendered. The town objected to so much of the decree as authorized the deduction of deposits from the gross assets. The amount thus found to be due, and for which a personal decree was rendered in favor of the municipality, was $2,208.54, which sum included the attorney's fee consequent upon the dissolution of the injunction. The bank prayed an appeal from this decree, and the town prosecutes a cross-appeal, alleging error in the order of the court directing the gross assets of the bank to be credited with the amount of its deposits.

H. A. Barr and *Howry & Falkner*,

Filed separate briefs, citing in the main the same authorities, and making the following points:

Independently of the tender of $250, with interest thereon, the bank was not in default as to the tax of 1888. And the tender of $250, and interest thereon, saved it from default as to the tax of 1889. Besides, the bank had the right to avail of the "condonation act" of 1892. The amended bill as to this was presented at the earliest possible time. The refusal to allow it to be filed was error. *Jeffries* v. *Jeffries*, 66 Miss., 216; Code 1880, § 1881.

The remark in *Vicksburg Bank* v. *Worrell*, 67 Miss., 47, that a bank failing to pay a sufficient privilege tax under the act of 1888 did not secure the exemption, is an *obiter dictum*. The true construction of the act is that such a bank is liable for what it failed to pay, especially where the failure to pay is a mistake. There is nothing in the act which looks to a forfeiture of exemptions.

It is a general rule that when the public is to be charged with a burden, the intention to do so must clearly appear.

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Brief for appellee.

Cooley on Tax., 266–269; 2 Story, 369; 62 Wis., 32. Forfeitures are never presumed.

The deposits were properly excluded from the taxable assets. *Horne* v. *Green*, 52 Miss., 452. Duplicate taxation is inadmissible under our constitution, which requires equality and uniformity. Cooley on Tax., 225. Deposits constitute indebtedness of a bank. Debts are not property. *Murray* v. *Charleston*, 96 U. S., 432. See also 59 N. H., 288; 59 *Ib.*, 621; 47 Am. Rep., 202.

Non-taxable state bonds were properly excluded from the taxable assets. Cooley on Tax., 80, 81. *Murray* v. *Charleston*, *supra.*

The act of 1888, in making the stock and assets the basis of taxation, in effect taxes them. It does not matter whether the person or thing be considered as taxed, it is the property that is the criterion. The tax is in respect to the property and to value. *Bank Tax Case*, 2 Wall., 200; 2 Black, 620. The tax here is a privilege tax only in name. In reality it is a tax on the assets, and the non-taxable securities cannot be included. *Welton* v. *Missouri*, 91 U. S., 275; *Brown* v. *Maryland*, 12 Wheat., 425.

Edward Mayes, for appellee.

If either the capital stock or the assets of the bank exceeded $75,000, the privilege tax paid by it was insufficient under the act of 1888. This must be conceded, unless the value of the state bonds or the real estate can be subtracted. Neither subtraction is allowable.

A privilege tax imposed, as in this case, in the nature of a commutation, is not a tax on property, but on the franchise, and is measurable by elements which would not be of themselves taxable. For the distinction between a tax on a business or a privilege and a tax on capital or property, and the right to tax the business regardless of how its funds are invested, see *People* v. *Tax Commissioners*, 2 Black, 620; *Society* v. *Coite*, 6 Wall., 594; *Provident Institution* v. *Massachu-*

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Brief for appellee.

setts, *Ib.*, 611; 9 Wheat., 859. That the tax in questio
franchise tax, see *Temple* v. *Sumner*, 51 Miss., 13; *Ca*
State, 60 *Ib.*, 456; *Folkes* v. *State*, 63 *Ib.*, 81; *Harne*
Williams, 64 *Ib.*, 600; *Vicksburg Bank* v. *Worrell*, 67 *I*

It is immaterial that the assets adopted as a measure
privilege tax include non-taxable funds or securities
Conn., 173, s.c. 6 Wall., 594; *Ib.*, 611; Burroughs on
tion, 174. See also *Bank Tax Case*, 2 Wall., 200;
Springs Savings Co. v. *Marshall County*, 52 Miss., 281.

Having failed to pay a sufficient privilege tax, the
failed to secure exemption from other taxes. *Vicksburg*
v. *Worrell*, *supra*. The decision in that case is right i
and in morals.

Even if deposits are not to be taxed *ad valorem*, the
part of the bank's assets, and to be computed in determ
the amount of its privilege tax. But I contend deposit
not be deducted, even in *ad valorem* taxation.

As to the subsequent tender, it is sufficient to say i
no compliance to offer to make up the requisite amount
after it was payable, and after the bank's delinquenc
been made manifest.

The decree should be reversed on cross-appeal. The
sequence of failure to pay a sufficient privilege tax wa
bility to *ad valorem* taxes as usual. Appellee's taxable
could not be reduced by the sum of its deposits. Thes
the property of the bank, and taxable as such. Cool
Tax., 388; 5 Wall., 663; 10 *Ib.*, 152; *Society* v. *Coite*, s
109 U. S., 398; 105 *Ib.*, 305; *Yazoo*, *etc.*, *Railroad*
Thomas, 65 Miss., 553. Individuals are not allowed t
duct what they owe. To allow banks to deduct its
from its solvent credits would be unjust discrimination.
1880, §§ 479, 481, 497; 100 U. S., 533; *Dailey* v. *Swop*
Miss., 367; *Mississippi Mills* v. *Cook*, 56 *Ib.*, 40; 88 Ill.,
5 Ark., 204; 89 N. C., 291; 42 Wis., 502, 527; 44 Ill.,
101 U. S., 153. There is no question of forfeiture invo
To tax deposits is not duplicate taxation. The depo

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Opinion of the court.

on it as a debt due him by the bank, and the bank pays
e debts due to it.
e "condonation act" of 1892 could not be availed of by
ank. It only purported to relieve against the penalty
nced by § 589, code 1880.

H. Whitfield, on the same side.

gued orally by *Edward Mayes*, for appellee.

IPBELL, C. J., delivered the opinion of the court.
Vicksburg. Bank v. *Worrell*, 67 Miss., 47, we held that
ct approved March 8, 1888, amending § 585 of the
of 1880, as to banks, was constitutional, and that its
se was to impose a tax, measured by the entire assets
bank, in lieu of all other taxes, and that a bank which
ccording to the requirements of that act thereby se-
the immunity from other taxation which it declares.
lded: "Any bank which did not estimate all of its as-
eyond the amount of its capital stock, and pay the
ege tax on the larger basis, is in default, and did not
the exemption from taxation declared by the law in
of those which conformed to its terms." This is the
ssion of the plain implication of the declaration imme-
y preceding, viz.: That such as complied with the
ecured its benefits. The obvious suggestion, the
tible inference, from this is that such as did not pay
ling to the law did not secure its benefits, and, in-
of leaving it to inference, this was plainly declared;
ow we are met by the assertion that this utterance is
This we deny, and adhere to it as a pertinent and
t declaration of the court in dealing with the matter
it. We hold now, as we said then, that any bank not
g paid as provided by the law did not secure its bene-
That was as far as it was proper for us to go then.
question before us now is, what taxation was a bank

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subject to, if it did not pay in accordance with the a
1888? We answer that § 498 of the code of 1880 gove
such case. It was never repealed. By the act, entitle
act to amend §§ 557 *and* 585, *code of* 1880," etc., app
March 18, 1886 (Laws, p. 12 *et seq.*), the privilege tax im
by the code of 1880 was materially changed; but § 498
code, which provides for taxing the capital stock paid
its market value, was not affected by it. That remain
full force, unaffected by the requirement of a privileg

The act of March 8, 1888, already spoken of, too
place of the act of March 18, 1886. It greatly increase
privilege taxes on banks, and declared their payment
in lieu of all other taxes upon banks; but it did not abr
§ 498 of the code. That remained in full force—inopera
the act of 1888 was complied with, but operative if it wa

The proposition that the assets of banks were taxa
those of individuals, is not maintainable. Section 498
code of 1880, copied from the code of 1871, § 1683, whic
transferred from the code of 1857, p. 77, art. 24, whic
taken from the act of March 5, 1846, Hutch. code, p
furnishes the rule for the taxation of bank stock.

Section 468 of the code of 1880 declares what pro
shall be exempt from taxation, and succeeding section
vide for obtaining lists of taxable property and placing
on the assessment rolls, but the capital stock of bank
other joint-stock companies is excepted from the ope
of the provisions applicable to property, generally, b
special provision contained in § 498, which looks to the
pany as the medium through which to impose a tax ac
ing to value on the capital stock paid in. In this wa
sought to tax, at its value, the personal property, cons
of shares of capital stock. Nominally, the tax is o
company, but, really, it is upon the share-holders who
the capital stock, who bear whatever burden is impos
the company, which is the aggregation of all who ow
capital.

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Opinion of the court.

The foregoing proceeds on the assumption that the bank of Oxford did not comply with the act of March 8, 1888, and secure immunity from other taxation; and this is true, for, while the assets of the bank considerably exceeded $75,000, it paid the tax prescribed for banks whose assets did not exceed that sum. Its claim is that it had $10,000 of its assets invested in non-taxable bonds, and, deducting this sum, its assets were reduced to $75,000. This position is not tenable. If every dollar of its capital stock and assets was invested in United States bonds, or other non-taxable securities, the liability to taxation would not be lessened, or in any way affected. The securities are not taxable, and are not taxed. The value of the shares of capital stock paid in is taxed. They are property, and taxable as such, no matter in what the assets of the company may be invested. An individual is taxable on what is due him. He is required to report to the assessor the amount of indebtedness to him in various forms of indebtedness, as well as money on hand or on deposit, that he may be taxed on these things. A bank is not required to do this. It may have many times its capital employed in discounts and loans, and receive interest on this enlarged basis, and it is not required, as an individual is, to pay taxes on this basis, but on the value of the shares of its capital. Why this is so, is not for judicial inquiry, but so the law is written, and has been in this state for about half a century, and it has been embodied in the constitution of 1890, permissively but suggestively to the legislature. § 181.

The notion that a bank may deduct the amount of non-taxable securities it may own, because an individual may, arises from misconception, and is completely dispelled by considering that the bank is not taxed as an individual, but in its representative character—that the owners of the bank, share-holders, are the burden-bearers of these taxes, and the bank is named and used as an instrumentality for reaching the property of share-holders in this form. Individuals are entitled to deduct from the sum of their claims such as are not taxable,

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because the basis on which they are taxable is amount due them; but, as the bank (or its share-holders) is not taxable on the basis of what is due to it, but the capital is to be taxed at its value to the share-holders, no deduction is allowable for any thing held by it. Its capital stock (and the shares into which it may be divided) is one thing, and the form in which it may have invested it is quite a different thing. Its entire capital may be put in non-taxable indebtedness, and the shares of its capital stock may thereby be enhanced or diminished in value, but their character as property, and liability to taxation as such, is not in any manner affected by the investment of the capital of the bank. If a bank has added to its capital stock any sum, by whatever name, which augments the value of its stock, and puts that in non-taxable securities, that does not entitle it to any deduction in taxation, but the capital stock, at its increased value by reason of such accumulations, is the basis of taxation, the purpose of the law being to impose on holders of bank stock taxes according to value, as on other forms of property. The owner of bank stock is not required to give it in to the assessor. Another mode of reaching it is provided, and that is through the bank, whose officers are required to report it, and the bank is to pay it. In other words, the share-holder is to be taxed, and pay through the bank. This is the simple scheme provided by our law for the taxation of corporate property, which has long been in force, and prevails elsewhere, and has been approved by the supreme court of the United States, as applied to national banks. *National Bank* v. *Commonwealth*, 9 Wall., 353.

Section 3764 of the code of 1892, taken from "*An act to amend the revenue laws*," approved February 24, 1890, expresses the true view of the law as it has existed in this state for many years on this subject. It differs from former laws in its enumeration of the factors in the value of stock, which, though included, were not expressly mentioned in former

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ments. This was to prevent evasion, and secure a just asurement of value.

e refusal to permit the filing of the amended bill, offered up the act granting relief from penalties under § 589 of ode of 1880, approved March 7, 1892 (Laws, p. 31), was , for that act has no sort of application to the subject of ontroversy. Its sole purpose was to give delinquents portunity to escape the consequence of delinquency as e enforceability of their contracts.

e decree is correct as to its finding that the bank did ay as required by the law of 1888, and did not secure ption from other taxation; but it is erroneous in fixing asis for the taxation of the bank. If it was taxable as dividual, the deduction from its choses in action of its ities in the shape of deposits was inadmissible, and, on ground, the decree is wrong in detail on the basis on n it was rendered; but, as shown, it is fundamentally g.

e reverse the interlocutory decree of November 27, 1891, he final decree in the cause, and remand it for such er proceedings as may be proper in conformity to this on. As this will require a settlement of the controversy view not before suggested in the cause, new pleadings evidence may be necessary, the consideration of which er we merely suggest without expressing any opinion.

Reversed and remanded.

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CASES ARGUED AND DECIDED

—IN THE—

SUPREME COURT OF MISSISSIPPI

—AT THE—

MARCH TERM, 1893.

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70 517
78 536

J. ALEXANDER, TAX COLLECTOR OF GREENVILLE, *v.* G. D. THOMAS, RECEIVER.

1. MUNICIPALITY. *Banks; taxation of. Valuation of stock. Laws* 1890, *p.* 9.

In taxing banks, under the act of 1890 (Laws, p. 9), municipalities have the right to levy seventy-five per cent. of the state tax on the value of the capital stock paid in, as shown by the statement required to be furnished by the bank to the county assessor. In the absence of a showing that the stock is worth more or less, it is to be rated at par.

2. SAME. *Duty of municipal authorities. Assessment.*

If the board of supervisors, in disregard of the statute, assess the capital stock of a bank at less than its value, on the ground that property generally is so assessed, it is the duty of the municipal authorities to disregard this, and assess the stock at its value.

FROM the chancery court of Washington county.

HON. W. R. TRIGG, Chancellor.

On May 1, 1891, the Bank of Greenville, domiciled in Washington county, by its president, W. A. Pollock, delivered to the assessor of the county a written statement, under oath, as follows:

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Statement of the case.

"As required by chapter 2, acts of legislature of 189
submit the statement for this bank, to February 1, 1891:

No. shares capital stock paid in—2,500 at $100 each . . .		$250,000 0
Surplus and undivided profits, net		582 4
		$250,582 4
For assessment—		
Estimated value of shares 66⅔ per cent. capital stock, surplus and undivided profits . . .		$250,582 4
Less real estate	$ 5,000 00	
Less 33⅓ per cent. on par value of stock . . .	83,333 33—	88,333 3
Amount for assessment		$162,249 1

By this statement it will be seen that the capital stock creased by surplus and undivided profits, amounted in v to $250,582.47, but by the latter part of the statement, the uation "for assessment" was put down at two-thirds of amount, or $162,249.14, and this latter amount was ado by the board of supervisors as the valuation of the ca stock of the bank, and the county taxes were levied acc ingly. This was done, it seems, upon the idea that the s should be taxed at two-thirds of its value, because prop generally was thus rated for taxation.

The assessor of the city of Greenville did not assess capital stock of the bank in making up the city assessm rolls. He reported to the council that the president of bank had refused to make a statement, as required by the of 1890, and had referred him to the statement which been made to the county assessor, a copy of which was tained by the city authorities. Thereupon, the capital s of the bank was assessed for city taxation for $245,58 The bank, through its president, objected to this assessm claiming that the city was compelled to follow the assessn as made by the county, and that, as other property was assessed for more than two-thirds of its real value, the c tal stock of the bank should not be assessed at a greater s The president admitted before the council that the staten

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Brief for appellee.

for the county assessor had been made as above shown because other property was taxed at only two-thirds its value. He was informed by the city authorities that if he would state that the capital stock of the bank was worth only two-thirds of its face value, the assessment would be made accordingly. This he declined to do, and withdrew the objection to the assessment.

Afterwards, when the city proceeded to collect taxes, the bank tendered to the collector $425.81, the city taxes due upon the capital stock of the bank upon the two-thirds valuation. The city tax-collector refused to receive this amount in full, whereupon the bill in this case was filed by the receiver of the bank—it having, in the meantime, failed—to enjoin him from collecting the excess. The bill was answered, and, afterwards, there was a decree in accordance with the prayer of the bill, from which this appeal is prosecuted.

J. H. Wynn, for appellant.

The city council properly construed the statement made by the president of the bank as to the value of the capital stock, by ignoring that portion of it following the words "for assessment."

The board of supervisors erred in following the latter part of the statement. It is immaterial that other property in the county was taxed at only two-thirds of its value. The object of the act of 1890 was to prevent just what was attempted in this case, the under-valuation of bank stock. The statement was prepared so as to have two meanings, and the latter part of it should have been disregarded.

Yerger & Percy, for appellee.

The act of 1890 is inartificially drawn, but its object was to fix a method of arriving at the value of bank stock for taxation. Under heavy penalties, a statement is required to be made and delivered to the county assessor. No method is provided for municipal assessment, no penalties are de-

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Opinion of the court.

nounced for a failure to furnish such a statement to the assessor, no statement is required to be furnished to b but cities and towns are prohibited from levying more t seventy-five per cent. on the state tax. It was not lef municipal corporations to fix the valuation as they see arriving at it through whatever means their inscrut wisdom might devise. No governing motive can be disce in the legislation, if the construction is to be as conte for by appellant—namely, that the *rate* of taxation is sev per cent. of the state rate, leaving the valuation to be f according to the sweet will of the city authorities.

The law means that municipalities may collect seventy per cent. of the amount collected for state taxes—seventy per cent. on the *valuation fixed as prescribed* in the act of 1

CAMPBELL, C. J., delivered the opinion of the court.

The city had the right to levy seventy-five per cent. of state tax on the capital stock paid in of the bank, as sh by the written statement of its president delivered to county assessor, and was not bound to, and would not been justified in, following the error of the board of su visors in disregarding the express provision of the law, the stock should be rated at par unless worth more or The law, which is highly favorable to banks in impo taxes, intends that the capital stock shall be paid on a value, and the par value is fixed as the standard, subje be varied by the facts. The idea that the stock is to be r at two-thirds of its par value, because property general rated thus, is utterly inadmissible.

Decree reversed, and cause remanded with directions for cree by the court below in favor of the appellant against ap and sureties on injunction bond for amount of taxes enjoined ten per centum thereon, and all costs.

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Statement of the case.

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J. F. CAZENEUVE ET AL. v. N. CURELL.

1. CHANCERY JURISDICTION. *Const.* 1890, § 161. *Action of trespass.*

Section 161, constitution 1890, giving the chancery court jurisdiction concurrent with the circuit court "of suits on bonds of public officers for failure to account for money or property received, or wasted or lost by neglect," does not confer on such court jurisdiction of a suit on the bond of a sheriff who has made an excessive levy of attachment on personal property, a part of which is destroyed while in his custody. Although discovery is asked as to the articles destroyed, this is simply an action of damages for trespass, cognizable only at law.

2. SAME. *Const.* 1890, § 147. *Supreme court. Inability to reverse.*

But, under § 147 of the constitution, which forbids the reversal of any judgment or decree on the ground of a want of jurisdiction arising from error as to whether the cause is of equity or common law jurisdiction, if the chancery court, though erroneously, assumes jurisdiction of such action of trespass, the supreme court is powerless to interfere.

3. SAME. *Const.* 1890, § 147. *Not confined to final decrees.*

This restriction upon the power of the supreme court to reverse is not confined to final judgments or decrees, but applies also to appeals from interlocutory orders or decrees where the question of jurisdiction is directly raised.

FROM the chancery court of Hancock county.

HON. W. T. HOUSTON, Chancellor.

The appellee filed her bill in the chancery court of Hancock county against J. F. Cazeneuve, sheriff of said county, and the sureties on his official bond, alleging that the sheriff, under a writ of attachment against J. T. Villars for $290.87, levied on certain personal property of complainant of the value of $1,825, taking the same into his possession; that the levy was wanton, oppressive, and excessive; that the property was, by the sheriff, for safe-keeping, placed in a house which was burned, and the property so levied on, to the value of $500, was destroyed, and the remaining property

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Brief for appellee.

damaged to the extent of $500. The bill further alleged complainant interposed a claim for said property in th tachment suit, which claim was adjudged against her, that the property saved was sold by the sheriff, the pro being more than sufficient to satisfy the judgment and c that the sheriff has not paid or accounted to complainan the property so destroyed and damaged; but had refus to do; that complainant did not know the exact amou property destroyed, or the extent of the damage. The p was for the discovery as to the nature and amount of erty destroyed and injured, and for an accounting as t loss, and a decree against the officer and his sureties fo sum found to be due.

Defendants demurred, on the ground that the bill sh no equity, and because complainant's remedy was at From a decree overruling the demurrer, defendants appe

E. J. Bowers, for appellants.

The real complaint is that the levy was wanton and ex ive. The fact that the goods were destroyed by fire is material. If the levy was not excessive, the officer is liable. The bill does not aver any negligence in the ma of keeping the goods. *Barnett* v. *Dalton*, 69 Miss., 611. action is therefore only for the tort, and is not cognizab the chancery court. The fact that a discovery is prayed not give jurisdiction. 2 Daniel's Ch. Pl. & Pr., 1557.

Section 161, constitution 1890, does not confer jurisdic That section only applies in cases where fiduciaries and cers have lost, wasted, or misapplied property or funds *fully* in their hands. It does not extend to actions *ex de* This is a suit for the tortious act of the sheriff in ta property. The court has no jurisdiction.

W. A. White and *A. M. Dahlgren*, for appellee.

It was not necessary to charge the sheriff with negli in failing to take care of the goods, as the seizure of th

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cess was unlawful. 7 Lawson's Rights, Rem. & Pr., § 3827; Freeman on Ex., § 253; *Smokey* v. *Peters*, 66 Miss., 471.

This is not an action for the trespass in taking the property, but is a suit to compel an accounting. The chancery court has jurisdiction concurrent with the circuit court of suits on bonds of public officers for failure to account for money or property received and wasted. Constitution 1890, § 161. That complainant could have sued at law for damages does not affect her right to sue in the chancery court for the value of the property. The sheriff took the property under the color of his office, and equity has jurisdiction in a suit on the bond to compel him to account for it.

WOODS, J., delivered the opinion of the court.

The record shows that this suit is really an action of trespass brought in a court of equity. The recovery is sought for an oppressive and excessive levy made by a sheriff of a writ of attachment, and is purely an action for damages for a trespass.

Section 161 of the constitution does not confer jurisdiction in cases of this character upon chancery courts. That section confers jurisdiction on chancery courts, concurrent with the circuit courts, "of suits on bonds of fiduciaries and public officers for failure to account for money or property received, or wasted or lost by neglect or failure to collect," etc. This is not a suit for the failure of a public officer to account for money or property received for appellee's benefit, or on her behalf; nor is it a suit for money or property wasted or lost by neglect or failure of the officer to collect under process in favor of appellee. It is a suit for the recovery of damages for an oppressive and grossly excessive levy, and § 161 has no application, and the court below was without jurisdiction, in our opinion.

But the court assumed jurisdiction, and, as this is the only error assigned, or apparent, we cannot reverse the decree overruling appellant's demurrer to the bill of complaint.

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Opinion of the court.

Section 147 of the constitution declares "that no judg
or decree in any chancery or circuit court, rendered in
civil cause, shall be reversed or annulled on the groun
want of jurisdiction to render said judgment or decree,
any error or mistake as to whether the cause in which i
rendered was of equity or common law jurisdiction; b
the supreme court shall find error in the proceedings
than as to jurisdiction, and it shall be necessary to re
the case, the supreme court may remand it to that
which, in its opinion, can best determine the controve
We find here practical authority for the virtual obliter
of the lines of demarkation between courts of law and eq
if the judges and chancellors of the inferior courts choo
disregard, or fail to observe, those distinguishing lines.
this court is forbidden to reverse or annul decrees or j
ments rendered in the lower courts, even if there was
of jurisdiction, if no other error than want of jurisdicti
to be found. That diverse and conflicting rules of pra
and procedure may obtain in the several court distric
plain. The chancery court of one district may assume j
diction of common law causes, and the equity courts o
adjoining districts may refuse to entertain such jurisdic
In the same district variant and uncertain rules and met
may obtain. The diversities of practice may be found i
same district under different chancellors or circuit judges
time to time presiding therein. It is practically withi
power of the chancellors and circuit judges, under this
vision of the constitution, to virtually abrogate the distin
between courts of common law and equity jurisdiction.
have the singular anomaly of a constitutional scheme of
courts, common law and equity, and yet with power in
inferior judges to effectually blend the jurisdictions, eac
his own district. But, remarkable as the results flowing
this anomaly are, we are not to disregard the plain req
ments of the fundamental law. The court below, in the
at bar, clearly had no jurisdiction, and should have susta

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the demurrer to the bill, and so have driven complainant to his common law remedy. But the learned chancellor having entertained jurisdiction, and this being the only error committed, we are forbidden to reverse.

It may be thought by some that the supreme court is forbidden to reverse only *final* judgments or decrees, where error from want of jurisdiction appears. But the all-sufficient answer to this suggestion is, that the framers of the constitution, with a clear apprehension of the distinction between final and interlocutory decrees and judgments, declare that *no* decree shall be reversed because of want of jurisdiction in the lower court. There is nothing to even suggest that only decrees or judgments determining and settling the merits, were included in this constitutional provision. We are not to arbitrarily interpolate qualifying words or expressions to limit a constitutional inhibition. The language is plain, unambiguous, all-comprehensive. The purpose of this section of the constitution is to prevent reversals because of want of jurisdiction in the court below. In other words, a decree or judgment, in all other respects correct, shall not be reversed simply because the right decree or judgment has been rendered or pronounced in the wrong court. If the final decree or judgment cannot, in such case, be annulled or reversed by us, if the laborious result of protracted litigation, in its completed finality, cannot be reviewed by us, what reason can be assigned for holding that an interlocutory order—a single step in the progress of the completed litigation—may be reversed or annulled by this court? Rather, must it not be held that, if the final decree or judgment, the perfected product of the litigation, is irreversible here when the only error is want of jurisdiction in the court below, each step in the course of the litigation, resulting in that perfected product, must be held irreversible also?

That the inhibition laid on this court in this section of the constitution, is not confined to action on final decrees or judgments, is manifest from a consideration of the startling

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incongruity of the civil administration which would
from adopting the construction contended for by those
would restrict the inhibition to final decrees or judgm
We shall, in that case, have the intolerable anomaly o
peals maintainable from decrees or demurrers in cou
equity, in cases where the lower court was without jur
tion, and, in like cases, no appeals allowed from judgme
circuit courts. Surely no one can be found to insist tha
absurd inconsistency of civil administration was any p
the constitutional scheme for mitigating what must have
supposed to be the evils of too rigidly observing the bo
of jurisdiction between the courts of law and equity.

We are bound to uphold and observe and enforce th
ganic law as we find it plainly written; and, if inconven
incongruity and seeming absurdity shall mark the adm
tration of civil law, we must not concern ourselves unn
sarily thereat.

The only error assignable is the want of jurisdiction i
court below to render the decree, and, as the learned
cellor entertained jurisdiction, under § 147 of the constit
forbidding a reversal in this court because of such erro

The decree overruling the demurrer is affirmed, and the
lants given leave to answer within thirty days after mandat
in the court below.

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Statement of the case.

HENRY EVANS v. LOUISVILLE, NEW ORLEANS & TEXAS RAILWAY CO.

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78 200
70 527
82 61

RAILROADS. *Negligence. Fellow-servant. Engineer and brakeman. Const.* 1890, § 193.

A railroad company is not liable for injury to a brakeman resulting from negligence of the engineer, who, after signaling for brakes, caused a sudden start of the train, while the brakeman was applying the brakes in obedience to the signal. While thus engaged in their routine duties in the operation of the train, the engineer is not "the superior agent or officer," or "person having the right to control or direct the services" of the brakeman, within the meaning of § 193, constitution 1890, regulating the liability of railroad companies for injuries to employes.

FROM the circuit court of Warren county.

HON. JOHN D. GILLAND, Judge.

Action by Henry Evans against the Louisville, New Orleans & Texas Railway Company to recover damages for personal injuries. The court sustained defendant's motion to exclude plaintiff's testimony, and, from a judgment for defendant, plaintiff appeals. The case is stated in the opinion.

That part of § 193, constitution 1890, involved on this appeal, is as follows: "Every employe of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the act or omission of said corporation or its employes as are allowed by law to other persons not employes, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work."

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Brief for appellant.

Magruder & Bryson, for appellant.

1. The engineer was the superior officer or agent of the brakeman within the meaning of § 193 of the constitution. The authority is not limited to any class. It means more than the power to control. It embraces all the cases where the right exists to direct the services of another. We admit that, as to many things, the engineer and brakeman perform their duties independently, under general rules incident to their service; but, in the matter of putting on and taking off brakes, the brakeman is under the absolute control and authority of the engineer, and the latter's orders are imperative. It is immaterial that they are communicated by signals. They are as much orders as if spoken or communicated by telegram. In fact, when the injury was sustained the brakeman was obeying orders. The injury was caused by the negligence of the engineer in omitting the signal which it was his duty to give. It is not necessary, to fix a liability upon the company in this case, to hold that the authority of the engineer over the brakeman extends to all the duties of the latter. A servant, as to some matters, may be under the control of one officer, and as to others under another officer. What we contend for is that, in the special matter of operating the train, and the use of appliances for this purpose, the engineer is responsible and has control. The case of *Railway* v. *Ramsey*, relied on by appellee, is not authority in this case, because our statute expressly declares the rule as to fellow-servants, where one injured is under the control of another as to any particular service, and it is not necessary that the extent of the authority makes the latter a vice-principal. Again, that decision follows the rule adopted in Ohio, which holds the conductor to be a vice-principal, and holds that the brakeman and engineer both act under general rules of the company, which give significance to signals, and that when a signal is given the rule of the company is obeyed, not the authority of the engineer. We submit that the absurdity of this reasoning is patent. In *Railroad Co.* v. *Wheless*, 10 Lea,

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741, which is also relied on by appellee, the decision was placed upon the ground that it did not appear that the engineer gave any order or direction to the brakeman at the time he was injured; and the same reasoning is applied in many other cases. The company is liable under statutes like ours, and in cases similar to this. See *Railroad Co.* v. *Jones*, 92 Ala., 219; *Railroad Co.* v. *Wilmer*, 11 So. Rep., 887.

Mayes & Harris, for appellee.

The engineer has nothing to do with the employment or discharge of the brakeman. He can report any failure of duty, and so can the brakeman report a failure on the part of the engineer. The duties of both are prescribed by the company. The failure of a brakeman to respond to a signal from the engineer is a breach of a duty to the company, not to the engineer. In the operation of the train they must, through necessity, communicate with each other. If they are not fellow-servants, in such sense that the negligence of one in regard to the other imposes no liability upon the company, then the rule has been practically abolished. The right to control and direct services must embrace supervision. It implies superiority. See *Railway Co.* v. *Ramsey*, 5 Am. & Eng. R. R. Cases, 533.

Argued orally by *L. W. Magruder*, for appellant, and *J. B. Harris*, for appellee.

CAMPBELL, C. J., delivered the opinion of the court.

The question presented is, has the plaintiff a right to recover for the injury sustained because of the negligence of the engineer, by reason of the change made in our law by § 193 of the constitution of 1890? The plaintiff was a brakeman, and was injured by the negligence of the engineer, who had signaled for brakes, and, while they were being applied in pursuance of the signal, caused a movement of the train,

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without proper warning, whereby the plaintiff was hurt. was not designed by the constitution to *abrogate* the ru law applicable to fellow-servants in a common employm but to *modify* it as expressed in § 193; and unless this falls within the specifications of that section, there can b recovery. The claim is that the engineer was the *sup agent or officer, or person having the right to control or dire services of the party injured.* This is not predicable of th lation between the engineer and brakeman, in the perf ance of the ordinary duties prescribed for them respecti by the rules of the company, and the nature of the ser As to these the relation of superior and subordinate does exist, but they are co-equal—co-ordinate co-operators, with a part to perform, like different members of the hu body, each with appropriate functions, some of greater or honor, it may be, but all necessary co-efficients in the plete whole. Neither can say to the other, "I have no ne thee," or claim superiority or right to control or direct services of the other in obeying the rules prescribed for obligatory on all alike. Their relation is correlative. have reciprocal duties, in enforcing the rules of the com superior for the successful operation of the train, and su ority or right to control, in the sense of the constitution, not be affirmed of them. The constitutional provision reference to a superior agent or officer, of the sort well kn as such, and any other person in the company's servic whatever name, who may be intrusted with the right to trol and direct the services of others, according to his cretion and judgment—one to whom is committed the d tion or control of others, for the accomplishment of some dependent on his independent orders, born of the occa sprung from him as director, and not consisting of the execution of routine duties in pursuance of fixed rule various employes, each charged with certain parts in general performance. It may be that under some cir stances the engineer may be the superior of the brakema

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the meaning of the constitution, but in the operation of the train, in accordance with rules, one is no more superior than the other, and they are not within the rule established by the constitution. To hold that they are, would, by interpretation, so enlarge the constitutional provision as to sweep away entirely the rule as to fellow-servants as existing before, in the face of the incontrovertible fact that the purpose of the framers of the constitution was, not to abrogate, but to modify to a certain extent, carefully expressed in § 193. Even with our view, there is not much of the formerly existing rule left, and if the engineer and brakemen on a train, in the execution of their ordinary functions, as prescribed for them, are not subject to its operation, we do not know to whom or in what case it could apply.

Affirmed.

J. M. A. BRENNAN ET AL. v. MISSISSIPPI HOME INSURANCE CO.

1. TAXATION. *Domestic insurance company. Const.* 1890, § 181.

Under § 181, constitution 1890, domestic insurance companies are protected against an aggregation of taxes, whether state, county, or municipal, in excess of the tax required of foreign insurance companies doing business in this state, until their assets become sufficient to yield an *ad valorem* tax, which, added to the privilege tax, will exceed the tax required of such foreign companies.

2. CONSTITUTIONAL LAW. *Exemption from taxation. Const.* 1890, § 112.

The provision of § 112, constitution 1890, that no county shall be denied the right to levy county or special taxes upon certain assessments, applies only to assessments of railroad or other like property not situated wholly in one county. With the exception of this provision, there is no limitation in the constitution on the power of the legislature to exempt property from taxation by counties, cities, towns, or villages.

FROM the chancery court of Warren county.
HON. CLAUDE PINTARD, Chancellor.

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Statement of the case.

The appellee is a domestic insurance company, charte under the laws of this state, and domiciled in Vicksbu It paid for the year of 1892 the privilege tax of $1,000, quired to be paid by every fire insurance company, whet domestic or foreign, doing business in this state. Its ass were also assessed for said year for the purpose of *ad valor* taxation by the county and state, and, after the time for payment of *ad valorem* taxes for that year had expired, Br nan, tax-collector for said county, and the tax-collector the city of Vicksburg, were proceeding to enforce the p ment of said *ad valorem* taxes by levy upon the property the company, when it filed this bill, seeking to enjoin the lection of such taxes. The bill alleges that the amount the *ad valorem* taxes claimed by the county is $280, and amount claimed by the city is $400, the aggregate of the mand being $680, which is less than the amount of privil tax required by law to be paid by foreign insurance com nies for that year.

The sole question presented is whether the appellee is ble to pay such *ad valorem* taxes, in view of the provis of § 181, constitution 1890, which is as follows: "Domes insurance companies shall not be required to pay a grea tax in the aggregate than is required to be paid by forei insurance companies doing business in this state, except the extent of the excess of their *ad valorem* tax over the pr ilege tax imposed upon such foreign companies."

The provision of § 112 of the constitution, reference which is made in the opinion, is as follows: "The legislat may provide for a special mode of valuation and assessm for railroads, and railroad and other corporate property, for particular species of property, belonging to persons, c porations, or associations not situated wholly in one coun But all such property shall be assessed at its true value, a no county shall be denied the right to levy county and spec taxes upon such assessment as in other cases of property uated and assessed in the county."

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Brief for appellee.

he defendants demurred to the bill, and also moved to olve the injunction. These being heard together, the t overruled both the demurrer and the motion, and, by decree, perpetuated the injunction; and from this de- defendants appeal.

. *V. Booth*, for appellant.

submit that § 181 of the constitution requires the *ad rem* tax to be paid at all events. If appellee is entitled ny relief at all, the reduction must come from the privi- tax of $1,000, which is the amount required of foreign rance companies. The section is obscure, but the general seems to be to place domestic insurance companies on same footing with foreign. Foreign insurance companies t pay an *ad valorem* tax on all property owned within state. Domestic companies must therefore do the same. ion 112 of the constitution requires that *ad valorem* taxes t be uniform throughout the state, and that the property ll private corporations for pecuniary gain shall be taxed he same way and to the same extent as the property of viduals. This section undoubtedly has reference to *ad rem* taxes. The construction contended for by appellee ates the rule of uniformity. Laws relieving from the mon burden of taxation must be strictly construed. *Ice v. Greenville*, 69 Miss., 86.

abney & McCabe, for appellee.

ection 181 of the constitution was intended to read as ows: "And domestic insurance companies shall not be uired to pay a greater tax in the aggregate than *the privi- tax* required to be paid by foreign insurance companies g business in this state, except," etc. This is obvious, e foreign insurance companies pay no tax except privi- s. There was no occasion to make special provision for estic companies in order to guard their rights against an ess of taxation generally over foreign companies. It

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seems preposterous that the constitutional convention sho have felt called on to make a special provision that the le lature should not require a domestic corporation to be burden greater than it would require of foreign corporati Especially is this so, since the constitution expressly prohi any discrimination. No other motive can be ascribed to convention than to afford some protection to domestic in ance companies. The privilege tax imposed by law upon insurance companies is directed at foreign companies, number of domestic companies being so insignificant tha account is taken of them. The purpose of the provi was to make it possible for domestic fire insurance c panies having limited capital to exist and do business in state.

The *ad valorem* tax of appellee, added to the privilege largely exceeds the privilege tax required of foreign c panies; hence, having paid its privilege tax, it is exe from *ad valorem* taxes.

CAMPBELL, C. J., delivered the opinion of the court.

The unmistakable purpose of § 181 of the constitution to "*domestic insurance companies*," is to protect them from aggregation of taxes whose sum shall exceed that requ to be paid by foreign insurance companies doing busines this state, except when their assets are great enough to y an *ad valorem* tax, which, added to any privilege tax requi will exceed the tax required of foreign insurance compan and as the appellee, a domestic insurance company, has b required by law to pay a privilege tax of one thousand doll the only way to make the guaranty of the constitution effec is to exempt it from any *ad valorem* tax until that shall exc the sum of one thousand dollars, which is the privilege required of foreign insurance companies of like charac and then tax any excess over the value which will prod the sum named. This is true, if the legislature may exe such property from local taxation. The only provision

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Statement of the case.

constitution in view of which it may be contended that may not be done is that in § 112, but the clause referred elates to railroads and other like property extending from ty to county.

s the legislature has the right to exempt property from tion by counties and cities, towns and villages, and has ired of the appellee a privilege tax of one thousand rs, which it has paid, in order to give effect to the con- tional provision, the legislative requirement of the privi- tax must be regarded as declarative of an implied im- ity from state, county and municipal taxes until there arise an excess of taxation in the manner stated. This lts necessarily, if the constitution and law both are to be eld, and in this way each has its full operation.

Affirmed.

STATE OF MISSISSIPPI, ON THE RELATION OF THE DISTRICT ATTORNEY, *v.* GEO. M. GOVAN, SECRETARY OF STATE.

CIPALITY. *Code* 1892, § 3035. *Rejection of chapter. Certifying action. Time.* Under § 3035, chapter 93, of the code, which took effect April 2, 1892, providing that any municipality preferring its existing charter might elect not to come under the code provisions, by resolution of its corporate authorities "entered of record and certified to the secretary of state within twelve months" after the chapter becomes operative, a resolution so adopted (though within the twelve months), but not certified to the secretary of state until afterwards, is ineffectual to prevent the operation of the code chapter as to such municipality.

ROM the circuit court of the second district of Coahoma ty.

ON. R. W. WILLIAMSON, Judge.

his is a proceeding by mandamus. The petition alleges the city of Clarksdale, by resolution of its corporate orities, duly entered of record, did, on January 3, 1893,

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Statement of the case.

elect not to come under the provisions of chapter 93, code of 1892, entitled "municipalities;" that it was, thereupon, ordered by the municipal authorities that said resolution be certified by the city clerk to the secretary of state on the fourth day of January, 1893, but that said certified copy, without fault of the municipal authorities, was not received by the secretary of state until April 12, 1893, when the same was filed by the secretary of state, but that he refused to make a record of the same, on the ground that it was not received in his office on or before April 2, 1893; that said municipal authorities, having duly elected not to come under the provisions of said code chapter, and having ordered the clerk to promptly prepare and certify to the secretary of state a copy of the resolution, as required by law, were not aware of the failure of the secretary of state to receive the same until after April 2, 1893. The prayer of the petition was that a writ of mandamus issue, directing the secretary of state to make record of said resolution, as provided by the statute.

The defendant demurred to the petition. On the hearing of the demurrer it was agreed that the certified copy of the resolution referred to was received by the secretary of state April 12, 1893. The demurrer was sustained, the relator declined to amend and the petition was dismissed. Relator appealed.

Section 3035, code 1892, being a part of chapter 93, which went into effect April 2, 1892, is as follows:

"From and after the date that this chapter becomes operative, every municipality in the state shall exercise the powers conferred herein on the class to which it belongs, and shall be governed by the provisions thereof. But an existing municipality, by resolution of its corporate authorities, entered of record and certified to the secretary of state, within twelve months after this chapter becomes operative, may elect not to come under the provisions hereof. The secretary of state shall make a record of such certificates received by

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Brief for appellant.

The provisions of this chapter shall not apply to a cipality so signifying the wish of its corporate author- unless thereafter, by a majority vote of the electors in, to be cast at a general or special election for the pur- it be determined to come under the operation of the ter."

e opinion contains a further statement of the case.

W. & W. D. Cutrer, for appellant.

e legislature of 1892 recognized that there were local- in the state where charters had been granted that were ally applicable to the wants of the communities affected, t was unwilling to revoke these charters outright. It fore adopted the wise policy of referring to the people e respective localities the question whether they would verned by their existing charters or a new law. There controversy in this case as to the completed expression e law of the municipality in accordance with the pro- n of § 3035 of the code. The returns, so to speak, were up and duly certified for transmission to the proper r. Shall it be said that, because they were not techni- received within the twelve months, the result of the on shall be nullified?

ovisions relating to the time in which returns are to be mitted are held to be directory only. 6 Am. & Eng. L., 340. See also authorities cited in Heidelberg's Miss. page 336. The statute requires that the resolution shall ntered of record and certified to the secretary of state n twelve months. It is silent as to the time in which ame shall be received by him. Therefore, when the re- are received, and show regularity upon their face, the r is left no alternative but to give effect to the will of people. As said by this court in *Jackson* v. *Shlomberg*, 47, each municipality was given an election to accept or t the code provision within twelve months, and the status e corporation was fixed by the election. The legislature

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was not willing to have any municipality, against it brought under the provision of the code chapter. The of the section must be taken together. The court w give effect to isolated parts of the statute to defeat the expressed by the municipality. In the Shlomberg ca effective resolution was not even certified to the secre state by the municipal authorities.

If the choice is made not to come under the provis the chapter, effect will be given to that choice. If the a majority of the voters elect to adopt the chapter, th municipality shall be governed thereby. The fact th result is not promptly transmitted to the secretary of sta not, in the one case more than the other, defeat the el Effect will be given to the popular will, whether expre the polls or through the municipal authorities. The fact that, by misadventure, or the possible contumac subordinate employe, the resolution is not delivered the time fixed, cannot defeat the popular will.

Cook & Anderson, on the same side.

The clerk is no part of the council, and it has no over his actions, except in so far as it could direct him order entered on the minutes, to perform the duty in upon him by law. The election of the authorities to the code provision was the *act* which fixed the legal sta the municipality. The act of the clerk as to certifyi resolution to the secretary of state was merely the *evid* the election, and did not affect the valid action of the a ities. Suppose the clerk, conspiring to defeat the will authorities, had fraudulently represented that he had mitted the resolution duly certified when he had not d would that deprive the municipality of the rights co upon it by law? Again, suppose the secretary of sta the clerk had conspired to render the resolution nug could their failure to perform the mere clerical duties in upon them have this effect?

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Brief for the state.

The certification and record of the resolution simply furnished a basis for the proclamation of the governor in assigning the municipality to its proper class, and nothing more. It is true the language of § 3035 of the code is broad enough to justify a different construction if we fail to consider the nature of the duties to be performed. But no mere failure of a clerical officer to perform his duties can have the effect contended for. When the corporate authorities passed the resolution they had done all that the law required. What right can be disturbed, or what innocent person affected, by the failure to record the resolution within the twelve months? The object of the record in the office of the secretary of state was merely to advise the governor of the act of the municipality.

Frank Johnston, attorney-general, for the state.

Section 3035, code 1892, declares that, from and after the date when the chapter becomes operative, every municipality in the state shall be governed by its operations. This is the general purpose. Then, by way of proviso or exception, it was declared that existing municipalities might elect not to come under the provisions of the chapter, if a certain thing was done within a limited time. The chapter is thus binding on all municipalities that do not conform to the subsequent condition defined by the statute. It is only by compliance with the conditions that the operation of the chapter is avoided. The municipality must pass a resolution electing not to come under the code provision, *and* must certify the same to the secretary of state within twelve months. Two acts are thus explicitly required, and both must be performed within the time fixed.

The purpose of the law was to have, within a fixed period, an official record in the office of the secretary of state showing the action of the various municipalities, and § 3037 of the code requires the governor, by proclamation, to classify each municipality as it comes within the operation of the code

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chapter. The permission by which a municipality may avoid the effect of the code provisions requires that the action shall be certified within the period of time named. If the limitation of time applies to the action of the authorities in making their election, it applies also to the certification. If it does not apply to the latter, then no time is fixed for certifying the resolution.

CAMPBELL, C. J., delivered the opinion of the court.

Chapter 93 of the code of 1892 was framed on the plan of all the municipalities in the state being governed by its provisions from the time of its becoming operative; but, because of opposition to this, it was provided that an existing municipality might elect not to come under the provisions of the chapter, by resolution of its corporate authorities, entered of record and certified to the secretary of state within twelve months after the chapter became operative. It was not prescribed how or by whom the resolution should be certified, and that is not of importance; but it is declared that the resolution should be certified within a time named, and that is essential to the accomplishment of a defeat of the plan on which the law was based.

The constitution requires general laws under which cities and towns may be chartered and their charters amended (§ 88); and by § 178 it is declared that "corporations shall be formed under general laws only." In view of the constitutional scheme thus plainly indicated, both as to municipal and other corporations, the chapter on municipalities in the code was prepared and adopted. The manifest purpose was that all should come under it, and thus have uniformity in the charter powers of municipalities according to their several classes; but, as stated above, the right of election was given, to be exercised in a prescribed time, and within that time to be certified to the secretary of state. Resolution without certification as directed was insufficient. The former expressed the will of the corporate authorities; the

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latter made it known to the designated official, and was necessary to the effective operation of the resolution not to come under. The rule deduced from the law is subjection to the chapter. The exception made is that compliance with certain conditions relieves from the operation of the chapter; and only by strict compliance with all that is prescribed can the claim of exemption from the operation of the rule be maintained. To admit that the resolution might lawfully be certified to the secretary of state after the time given, and be effective, would thwart the scheme of the law to have in the office of secretary of state, by April 2, 1893, official information on which the governor is required, by § 3037, to act, and from which the courts can take judicial notice, as required by § 3038 of the code. After April 2, 1893, and so long as the resolution of the corporate authorities was not certified to the state officer, it would not be known, in the way prescribed by law, that it had been resolved not to come under the chapter; and it would be assumed, in accordance with the law, that the chapter was operative on the municipality not having certified the resolution to the contrary; but six or twelve months afterward, or at some longer period, it would be certified to the secretary of state that a resolution was adopted by the corporate authorities within twelve months from April 2, 1892. During all this period, the status of the municipality, as subject to the code chapter or its former charter, would not be determinable from the records of the office of secretary of state, which would contravene the manifest purpose of the law. True, it would make no difference to the municipality. Its corporate authorities would know of their own action, and govern themselves accordingly; but the purpose of the law is that the status of every municipality shall be known to all, not by application to the record it has, but by the showing of the office of secretary of state. If, on April 2, 1893, which was twelve months from the time when the code chapter became operative, the office of secretary of state did not contain the cer-

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Statement of the case.

bonds, as above, were set forth. There was a preamb
the ordinance, reciting the fact that the railroad com
had submitted to the council the proposition for subscri
but in neither the ordinance nor the notice of electio
any mention made of the limit of time for the completi
the road. The ordinance was passed July 14, 1890.

The election was held, and on August 11, 1890, an
nance was passed, reciting the fact of the election a
result in favor of subscription. By it the mayor was au
ized and directed to subscribe for the town to the capital
of the company in the sum of $12,500, "to be paid i
bonds of said town as proposed by said railroad compan
accepted by this council, subject to the voting of said
scription." The ordinance directed the preparation o
bonds, and, further, that "the said bonds so prepared
be delivered to the president of said railroad company b
said mayor, upon the receipt by the said mayor from
president of one hundred and twenty-five shares o
capital stock of said company, issued to the town of
dale, and the guaranty of said president as provided i
application. *Said bonds and coupons shall be made payo
bearer, but at the time and place before ordained.*" Ther
no express allusion in this ordinance to the limit of
for the completion of the road. The subscription t
stock was made, the railroad company gave bond as req
and the interest-bearing bonds of the town, payable to b
were delivered to the company October 1, 1890.

On September 4, 1891, after the constitution of 189
gone into effect, the railroad company addressed a comm
cation to the municipal authorities to the effect that, be
of unexpected stringency in financial circles, it had bee
able to negotiate the bonds or to realize on other secu
and that, while work on the railroad had begun withi
time agreed upon, still it could not be completed within
time. It prayed for an extension of the time until Ja
1, 1893, on such terms as the authorities should deem

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Statement of the case.

eupon, on the same day, the municipal authorities passed rdinance granting such additional time, on condition of rrender of certain interest coupons by the railroad com- and of the execution of a new bond conditioned for liance with the contract on the part of the railroad com- These conditions were complied with, and a new bond given and approved.

April 2, 1892, was approved an act of the legislature ding that the said railroad company should, within een months therefrom, commence the work of construc- on said road, and should complete the same within ten from March 1, 1892, and, failing so to do, that it should t its charter and franchises as to so much of said road as d not be completed under the requirements of the act, hat all bonds voted by the people, or issued by the board pervisors, for the portion of the road not built, should id.

April 3, 1892, nine months before the time for the com- n of the road under the agreement for the extension of the appellant, Fred Clark, a citizen of Rosedale, on f of himself and other tax-payers of said town who t choose to join in the suit, filed the bill in this case st the town of Rosedale and said railroad company, ing that said bonds were void, because the railroad had been completed within the time stipulated, and praying the bonds should be canceled. The defendant answered, decree was entered dismissing the bill, from which com- ant appeals.

ction 19 of the act of 1890, under which the subscription made, authorizes the municipal authorities, upon the on of twenty freeholders who are voters, stating the unt and terms of the subscription, to order the election provide for holding the same, and that the result of the on shall be entered on the minutes of the board. Section ovides that if the election is in favor of subscription, the r shall subscribe to the capital stock, and, when author-

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Brief for appellees.

ized by the qualified electors, shall deliver to the compa bonds of the municipality. Laws 1890, p. 690.

Fred Clark, pro se.

1. The condition under which the bonds were vote issued was not complied with by the railroad company therefore, under the contract, the bonds were void, an matter stood as if there had been no election.

2. The subsequent proposal of the railroad compa extend the time for completing the road was nothing than a proposition for the issuance of new bonds, becau old bonds were then *functus*. This proposition require assent of two-thirds of the qualified electors of the to Rosedale, under the constitution then in force. Ther the action of the municipal authorities in assuming to e the time was *ultra vires*, and gave the bonds no validity

The terms of the contract under which the bonds issued were fully stated in the proposition of the ra company voted on by the people, and the municipal au ities had neither express nor implied authority to chan terms of that contract.

Mayes & Harris, for appellees.

1. There is no question of the power to make the sub tion or issue the bonds. This is given both by the c of Rosedale and that of the railroad company.

Did the negotiations between the parties impose a tion in the contract, an obligation that the road shou completed by October 1, 1891? Was completion by date of the essence of the contract? We answer, No. true the proposition of the railroad company containe feature, and the final order of the council provided tha bonds would be delivered in accordance with the comp proposition; and it is true that the parties for some tim ceeded on the supposition that the completion withi time named was a material part of the contract; bu parties were in error.

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Brief for appellees.

he contract was made, not by the negotiation between the pany and the council, but by a vote of the people on the osition submitted under the statute authorizing the same. limit of time is found only in the negotiation with the cil. It is not found in the statute, nor in the question hich the people voted, nor in the vote. It was a term ted in the contract by the council without authority, and suggested by the company manifestly as an inducement et the proposition through. The subsequent history of case developed the fact that the people did not care to t on that term.

nder the act of 1890 (Laws, p. 690, § 19), the proposition bscribe must come from the freeholders of the town, not the company. The petition of the freeholders is the izing step; that of the company is unknown to the stat- Here the freeholders' petition contains no limitation of ; nor was it in the order of submission or the notice of ion. The vote was for the unconditional subscription. r election, the only function of the council was minis- l—to ascertain the result and enter it on the minutes. action of the mayor in delivering the bonds and receiv- he stock certificates, was proper.

he fact that the company supposed that an onerous con- n, to which it had offered to submit, had been accepted, n it had not, did not avail to subject it to that condition. contract is statutory, and the statute limits its opera- The bond executed by the company is without consid- on, and void, because it was not bound to do the thing doing of which the bond undertakes to secure. We n that the bond is void in so far as it undertakes to make late named of the essence of the contract.

Suppose the foregoing view be not accepted, then we he council waived the requirement insisted upon by ex- ing the time of completion. Power to make the sub- tion was complete, and the vote was duly taken. In there was no requirement as to the time of completion,

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Brief for appellees.

nor was there such requirement in the statute. That req
ment, supposing it to be effectual, was by the council a
and it could modify or abandon it. *County of Randol*
Post, 93 U. S., 502.

Section 183, constitution of 1890, did not deprive the c
cil of the power to make the waiver. This section is dire
against the making of subscription *thereafter*. It does
profess to affect those already made, but, on the cont
declares that where subscriptions have been authorize
vote, prior to the adoption of the constitution, and the t
of submission and subscription have been complied with,
subscription may be consummated. This section is n
like that of the Illinois constitution quoted in above
The subscription was made in August, 1890, several mo
before the constitution was adopted. On this point see
gent v. *Supervisors*, 19 Wall., 241.

There is nothing to prevent the council from relinquis
the exaction, unexpectedly injurious to the town, which
not imposed either by the statute or the vote, and was no
element in the proceeding essential to the consummatio
the subscription. An instructive case in this connecti
that of *German Bank* v. *Franklin County*, 128 U. S., 526

Another reason why § 183 of the constitution does
avoid this extension, is in the special nature of this cont
which was such that the extension is immaterial only o
question of the *bonds*, while the constitution deals only
the question of *subscription*.

The bill speaks of the promise to complete the roa
October 1, 1891, as a condition, but it was not such. It
neither a condition precedent nor subsequent. The s
was paid for by the delivery of bonds, negotiable and
questionably valid at the time. Nowhere is there any st
lation in the contract that the failure to complete the
October 1, 1891, was to cancel the town's subscription, o
validate the bonds.

The term which has given rise to all the trouble—the

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tation of time—is not one of these made conditions subsequent. It is not in the submission or the subscription.

CAMPBELL, C. J., delivered the opinion of the court.

The rights of none except the parties to the contract are involved in this suit. It is not embarrassed by the claim of any third person, and the only question is, what is proper as between the town and the railroad company? There can be no dispute of the fact that the vote for the subscription was with reference to the guaranty by the company that the road would be built to a certain point within a time named; and failure to accomplish this entitled the town to a cancellation of the bonds, and a return of any interest paid on them. If the bonds had been negotiated as contemplated, the only reliance of the town for indemnity for the breach of the contract would have been the bond it took for that purpose; but, as the bonds remained in the hands of the company, it is proper to decree their surrender and cancellation, whereby the contract made will be carried out according to the intent of the parties.

The fact that the petition of citizens, and the order of the town authorities for the election, did not specifically mention the proposed completion of the road to a point and within a period named, makes no difference, since it is apparent that the written proposal of the company for a subscription on this basis was the foundation of the petition and order for an election, with reference to which both are to be read. The proposal of the company, containing the assurance of the completion of the road as stated as an inducement to the town to subscribe and pay by bonds, accompanied the petition of citizens for an election; and upon these the order for an election was made, and all must be read together as one whole. While there was not a *condition* strictly, there was a stipulation, the breach of which gave the town a right of action on the bond it took as security for the performance of the stipulation; or, as a more effective and appropriate rem-

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Statement of the case.

edy, a right to invoke the power of chancery to cancel the bonds in the hands of the company.

The extension of time to complete the road by the town authorities was of no effect, for the want of power in the municipal board to materially vary the contract authorized by the vote at the election held. This case is widely different from *County of Randolph* v. *Post*, 93 U. S., 502, which rests upon the doctrine of estoppel, if it has any support at all. Here there is no feature of that sort.

The decree is reversed, and cause remanded; or a decree may be entered here, if desired, cancelling the bonds.

FIRST NATIONAL BANK OF GREENVILLE ET AL. *v.* H. M. MONTGOMERY.

1. TROVER. *Pleading. Evidence. Description of property.*

While the same particularity of description of the property in trover is not required as formerly, it still is necessary that the *res*, for the conversion of which the action is brought, should be at least generally described in the declaration and identified by the evidence.

2. SAME. *Insufficient identification of property. Case.*

In such action, where the declaration alleges the conversion of an entire stock of merchandise, consisting of numerous and different kinds of articles, and the evidence shows the conversion of only part of the stock, without designation of the quantity, character or class to which the converted articles belong, plaintiffs are not entitled to a verdict, and an instruction for defendant is proper.

FROM the circuit court of Sunflower county.

HON. R. W. WILLIAMSON, Judge.

Appellants owned a stock of goods in a store in Sunflower county, Mississippi, and they instituted this action of trover against the appellee, Montgomery, for the alleged conversion of the same. The goods are described in the declaration as

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Brief for appellants.

sting of a great many different kinds of articles, the e being of the value of $2,500. The evidence tended to that defendant had received goods to the value of about The court below held that this was too indefinite, and ucted the jury to find for defendant. Verdict and judg- accordingly. Plaintiffs appeal. The opinion contains ther statement of the case.

yne & Watson, for appellants.

over was maintainable. Abbott's Trial Evidence, page The description of the articles converted is sufficient. value, and not the thing, is recoverable in this action. rally the articles should be specified, but as the object in fying is to constitute the verdict a bar in a subsequent n, the description of all the goods at a certain place is ient. Chitty's Pleading, 392. However, no objection nade to the form of action or pleadings.

ere was sufficient evidence to permit the case to go to ury. The court should not have instructed for defendant. *g* v. *Hamilton* (Miss.), 10 So. Rep., 429.

hether Whitehead had been constituted the agent of tiffs was a question of fact for the jury.

G. Paxton, on the same side.

the defendant had wrongfully taken the goods of plaint- nd mingled them with his own, the whole could have taken. Cooley on Torts, page 52. This is not a case nfusion of goods, but the principle applies. What par- ar goods defendant received could not be shown, but tiffs established that he had received some of the goods. he be permitted to go free because of plaintiffs' lack of f of what goods he received? The defendant could have y given a description of the goods. When plaintiffs ed that defendant had taken some of the goods, then it ncumbent on defendant to show what particular goods ad received, if the description was material. In any

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event he must pay the value of the goods received, no ma
what the description.

Calhoon & Green and *T. R. Baird*, for appellee.

1. There was no proof tending to show what chattels
been converted. The declaration alleges the conversion
a large stock of merchandise, consisting of various artic
but the evidence only tends to show that defendant purcha
a small quantity of goods without describing or in any
identifying the same. The gist of the action being a c
version, and the value being merely the measure of dama
proof merely of value is not an identification of the artic
3 Robinson Prac., 442.

2. Under the allegation of the conversion of the wh
stock, plaintiffs' effort to show the conversion of an indefi
portion was a variance. There was no allegation to wh
the proof, as made, could be applied, and therefore the
struction to find for defendant was correct.

COOPER, J., delivered the opinion of the court.

The insuperable obstacle to a recovery by the plain
in this action is the want of identification, by the evide
of the goods of the plaintiffs which came to the hands of
defendant, and were by him converted. Not only does
evidence fail to show the quantity and character of the
eral articles, or the value of any one of them, but it also
to suggest the class to which they or any of them belo
The whole proof is that out of a stock of goods, such as
usually kept by a country merchant, the defendant got go
of some sort of about the value of $175. This, we th
is too indefinite to warrant a recovery in this action.

The plaintiffs counted for the entire stock of goods situ
in their store-house in the town of Bairds. It may be c
ceded, for the purposes of this examination, that the desc
tion of the property would have been sufficient to suppo
verdict if the evidence had shown a conversion of the wh
stock by the defendant, or that there was any concerted

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tion between him and Whitehead, by whom, according to the evidence of the plaintiffs, the entire stock was converted. In *Edgerly* v. *Emerson*, 23 N. H., 555, a very similar description was held insufficient, even after verdict, and the judgment was arrested. But, if the description should be held sufficient, as applied to the whole stock, the difficulty of the plaintiffs' situation is not obviated, for the evidence tends only to show the conversion of some indefinite quantity of goods, of an uncertain character, worth about $175. It is true the same particularity of description of the property is not now required as formerly, and that less is necessary than in detinue or replevin, in which the specific thing is sought to be recovered. But, though the action of trover is now considered as one for damages, and greater liberality prevails in relation to the description of the property, it is yet necessary that the *res*, for the conversion of which the action is brought, should be at least generally described in the declaration, and identified by the evidence. It has been held that trover "for four hundred ends of deal-boards" was a sufficient description, because the words had a known meaning to the trade; and so for "two packs of flax and two of hemp," without setting out the weight or quantity, and for "three ricks or stacks of straw," without alleging the quantity in each, and for "six parcels of lead," and for "a library of books," without expressing what the books were. *Taylor* v. *Wells*, 2 Saunders, 74, and note. But in all these cases the nature of the articles taken is at least generically given.

The evidence here tends only to show that personal property of some character, such as would be found in a mercantile establishment, of the value of $175, was taken and converted by the defendant. We have been able to find no precedent which would support a verdict on this evidence in an action of trover, and the judgment of the court below must be— *Affirmed.*

CAMPBELL, C. J., being disqualified by reason of interest, took no part in this decision.

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JOHN GIBSON v. THE STATE.

CRIMINAL PROCEDURE. *Impaneling jury. Challenges. Full panel.*

Under § 1423, code 1892, providing that "all peremptory challenges state shall be made before the jury is presented to the prisoner, a all cases, the accused shall have presented to him a full panel befo ing called upon to make his peremptory challenges," the accused, criminal case, is entitled, after the tender of a full panel and his lenging any of the jurors thereon, to have the panel again comple the state before he is required to pass on the jurors added; and again excuses any of the added jurors, the state must again fill the before tendering new jurors; and so on, in this manner, until a j secured. If the accused is required, over his objection, to challen dividual jurors as presented, it is error for which a judgment of c tion will be reversed.

FROM the circuit court of Warren county.
HON. R. W. WILLIAMSON, Judge.

No counsel for appellant.

Frank Johnston, attorney-general, for the state.

Literally, a full panel was presented to the prisoner a outset. The question is whether, under § 1423, code 18 was proper to permit a separate presentation of jurors t the panel. I submit the question to the court.

Argued orally by *Frank Johnston*, attorney-general.

COOPER, J., delivered the opinion of the court.

The appellant has been convicted of the crime of mu and sentenced to capital punishment.

He is not represented in this court by counsel, but, in of this character, it is our custom to scrutinize the re and affirm or reverse according as it shall appear that

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iction was properly or improperly had, and without ref-
ce to whether error has or has not been assigned under
rules.

appears from the record that in impaneling the jury by
h appellant was tried, a panel was completed and ac-
ed by the state, and then tendered to the defendant, who
mptorily challenged seven jurors, leaving five in the box.
appellant then asked that the state should be required to
fill the panel before he should be put to further chal-
es, which request was refused, to which action he ex-
ed. In completing the panel, the court directed that
juror should be first examined and accepted by the state
then tendered to the defendant, who should challenge or
pt the juror. The defendant excepted to this ruling, and
usted his peremptory challenges before the panel was
pleted.

he question presented by this ruling of the trial court is,
ther, by § 1423 of the code of 1892, the defendant is en-
l to a full panel whenever called on to exercise any one
is peremptory challenges. Before the enactment of this
on; it is settled by several decisions that the course pur-
would have been legal. *Thompson* v. *The State*, 58
., 62; *Smith and Cavin* v. *The State*, 61 Miss., 754.
ction 1423, code 1892, is as follows: "In capital cases,
defendant and the state each shall be allowed twelve per-
tory challenges. In cases not capital, the accused and
state each shall be allowed four peremptory challenges.
all peremptory challenges by the state shall be made be-
the juror is presented to the prisoner; and in all cases
accused shall have presented to him a full panel before
g called upon to make his peremptory challenges."
he learned judge below obviously thought the injunction
he statute, that the accused should have presented to him
ll panel before being called upon to make his peremptory
lenges, had been fully complied with when one complete
el had been tendered, misled, probably, by the preceding

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clause requiring the state to exercise its peremptory c lenges "before the *juror* is presented to the prisoner."

The section—copied from former codes, except as to its cluding clause—is not happily worded. In the first cl the defendant in capital cases is called the "defendant; the second, the defendant, in cases not capital, is called "accused;" in the first sentence of the third clause the fendant is called the "prisoner," and, in the second, "accused." If we should follow the general rules of struction, that the same meaning is intended for the s expression in every part of the act, and that a chang expression is intended to change the meaning, we sh construe the word "defendant" in this statute to mean charged with a capital crime, and the word "accused," charged with a crime not capital. But, from this const tion, it would follow that one charged with a crime capital would be entitled to a full panel before being c on to exercise his peremptory challenges, while one cha with a capital crime would not be so entitled. But t rules of construction are not of great weight in referen statutes containing a multiplicity of words (Endlich on terpretation of Statutes, § 387), and should not be obser if, by so doing, the obvious purpose of the act would be feated. In other sections of the chapter of which this part, the word "defendant" is indifferently applied to classes of offenders, and we cannot perceive a clearly pressed purpose to give the right secured by this sectio persons charged with minor offenses and deny it to t indicted for capital crimes.

We are also unable to perceive why a defendant shoul secured a full panel on which to exercise a part of his emptory challenges, and yet be required to exercise the mainder upon individual jurors as presented. It is true statute, in providing that the peremptory challenges of state "shall be made before the *juror* is presented to the oner," seems to imply that the defendant may be called u

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to accept or challenge the juror tendered by the state; but this expression, copied from former codes, by which the defendant was not entitled to a full panel, is followed, in the code of 1892, by the declaration that he shall have a full panel before being called upon to peremptorily challenge. It is true the letter of the statute was complied with in this case, for the defendant was tendered a full panel before he was put to his peremptory challenges. But the jurors called to take the places of those of the panel challenged by the defendant were not members of the panel, and upon such only do we think was he required to exercise his peremptory challenges.

Under the statute, a full panel should be passed on and accepted by the state and presented to the defendant. He should then be required to peremptorily challenge all those of the panel so presented he desires. The state should then fill the panel, and again present it to the defendant, who should then be allowed and required to continue his challenges from those added by the state until he has excluded those to whom he objects, within the limit of his challenges, when the state should again fill the panel and present it to the defendant, and thus proceed until the jury is secured.

For the error in requiring the defendant to peremptorily challenge the individual jurors as presented, the judgment is reversed, a new trial awarded, and cause remanded.

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Statement of the case.

H. M. OVERTON v. THE CITY OF VICKSBURG.

1. INTERSTATE COMMERCE. *License tax. Citizen of another state.*

A city ordinance imposing a license tax on transient peddlers, so fa applies to a non-resident traveling agent selling goods by sampl corporation in another state, though the goods are sent to him livery, is void as an attempt to regulate interstate commerce. *Texas*, 128 U. S., 129, followed.

2. FEDERAL QUESTION. *United States supreme court. Decisions authoritat*

This court will consider authoritative the decisions of the supreme of the United States on a federal question.

FROM the circuit court of Warren county.

HON. J. D. GILLAND, Judge.

Appellant is a citizen of Louisiana. He was acting as for the Southern Installment Manufacturing Company, poration domiciled at New Orleans in said state, selling in this state. In the prosecution of its business, this com employed a number of agents or canvassers in the dif states, appellant being one of the number. They were nished with samples of the goods to be sold, and carried from house to house soliciting orders. When an order w be obtained, it would be forwarded to the house at Orleans, which would ship the goods to the agent ma the sale, and he would deliver the same to the purch collecting the first installment of the purchase-money, was applied as a part of his commission for making the The remaining payments would be received by a colle agent. Appellant was engaged in the prosecution of business in the city of Vicksburg, when he was arreste failing to comply with an ordinance of the city requirin transient peddlers to pay a privilege tax and procure a li This tax appellant refused to pay. He made no sales e in the manner above stated. He was convicted in the ma

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t, and, on appeal to the circuit court, was again convicted. ce this appeal.

eorge *Anderson*, for appellant.

his is another instance of a city trying to regulate inter- commerce. *Richardson* v. *State*, recently decided by this t on the authority of *Robbins* v. *Shelby County*, 120 U. S., is decisive of this case.

is immaterial that defendant delivered the goods and cted the first payment thereon. The authorities uni- ly held that in such cases a license tax cannot be imposed. v. *Agee*, 83 Ala., 110; *Ex parte Murray*, 93 *Ib.*, 78; *Mc- ghlin* v. *South Bend*, 126 Ind., 471; 41 Fed. Rep., 775; 47 208, 539.

V. Booth, for appellee.

his case is distinguishable from *Robbins* v. *Shelby County*, U. S., 490, and similar cases. Appellant was not taxed elling goods situated in another state. The tax was im- d for peddling goods in this state and collecting the e therefor. Can a foreign establishment have a depot for reception of goods here, and sell them by agent, without ing the burdens imposed on domestic dealers in the same ness?

here is no sale without a delivery, and, as the delivery is e here after the goods come within the jurisdiction, the is made here. When goods are purchased through a mer in the ordinary course, they are delivered to a car- and the title passes *eo instanti* to the consignee, and this pletes the sale.

he law which seeks to exempt from the common burdens xation should be strictly construed.

AMPBELL, C. J., delivered the opinion of the court.

he facts of this case bring it fully within the rule de- d in *Robbins* v. *Shelby County*, 120 U. S., 489, and *Asher*

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v. *Texas*, 128 U. S., 129 (followed, reluctantly and with ifest disapproval, in *State* v. *Agee*, 83 Ala., 110, and *Ex Murray*, 93 *Ib.*, 78, and *Simmons* v. *McGuire*, 39 La. 848, and *Wrought Iron Co.* v. *Johnson*, 84 Ga., 754, and *Laughlin* v. *South Bend*, 126 Ind., 471); and so long as view on which that rule was announced shall prevail the supreme court of the United States, however erron it may be regarded by the courts of the states, they recognize and apply it.

Constrained by the authoritative decisions of the sup court of the United States on this federal question, our is to reverse the judgment of the circuit court.

Reversed and rema

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R. R. PORTER *v.* CITY OF WATER VALLEY.

MUNICIPALITY. *Validity of ordinance. Power. Retailing meats.*

Under a charter giving the right "to regulate the vending of meats b into the city for sale," and "to license, tax and regulate butch municipality may adopt ordinances to prevent the retailing of meats from 4 o'clock P.M. to 9 A.M., except by persons licensed.

FROM the circuit court of the second district of Yalob county.

HON. EUGENE JOHNSON, Judge.

Appellant was convicted in the mayor's court of a ch of violating an ordinance of the city of Water Valley. appealed to the circuit court and was again convicted. H this appeal.

Section 1 of the ordinance in question, which the appe violated, makes it unlawful for any person to sell fresh m by retail within the corporate limits between the hours o'clock P.M. and 9 A.M. of the next day. Section 2 pro that any person desiring to keep a market, or a place to

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Brief for appellant.

meats, shall make written application to the board of or and aldermen for a permit, which the board is author- to grant upon such terms as may be determined for the interests of the city, it being empowered to refuse any ication the granting of which may be regarded as detri- al to the welfare of the city. Section 3 provides that no permit to keep a market-place shall issue to any one has not obtained a license authorizing him to carry on usiness of a butcher within the city limits.

nder an act to amend the charter of Water Valley, ap- ed March 18, 1884 (Laws, p. 751), the board of mayor aldermen, among other things, is given power by ordi- e "to regulate the vending of meats brought into the for sale," and "to license, tax and regulate butchers," etc. he agreed statement of facts shows that the appellant a meat-market and sold fresh meats within the corpo- limits, having a slaughter-house just outside; that he ied to the board of mayor and aldermen for a permit, as ired by the ordinance, which application was refused, use he had not taken out a butcher's license, which license d be obtained by any one on the payment of $20. Ap- nt refused to pay the $20, except under protest, and upon the board refused to grant him a permit.

immons & Chapman, for appellant.

he ordinance under which appellant was convicted is , because of the want of power in the board to enact it. act of 1884 does not give power to tax meat-markets market-places. The power to tax is never to be inferred, must be given in terms. Dillon on Mun. Corp., §§ 357, 763, 768; 35 Miss., 189; 58 *Ib.*, 748.

was not competent for the board to reserve the power to upon applications, and arbitrarily reject the application ny person for a permit to do a lawful business.

he ordinance is for the collection of revenue, and is not a ce regulation. It is unreasonable in providing that no

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permit shall be issued thereunder to any one who ha obtained a butcher's license. The most suitable person r desire to sell meats without carrying on the business butcher.

The ordinance either restrains trade and gives a mono or it collects a tax indirectly which the city has no pow impose. In either view, it is void. Dillon on Mun. C §§ 323, 324. It also contravenes a common right. Not the legislature has the power to prohibit following a l pursuit without the payment of a privilege tax to follo other. *Ib.*, § 325.

Though the revenue is collected indirectly, it is, neve less, a tax. *Ib.*, § 768.

Where there is a fair and reasonable doubt as to wh the power to tax is given, the doubt is resolved agains corporation. Dillon on Mun. Corp., § 89; 35 Miss., 89.

I. T. Blount, for appellee.

Under § 3 of the act of 1884 (Laws, p. 751), the city ample power to pass the ordinance in question.

CAMPBELL, C. J., delivered the opinion of the court.

The grant by the charter of the right "to regulat vending of meats . . . brought into the city for and "to license, tax and regulate butchers," etc., autho the adoption of appropriate ordinances to prevent the r ing of meats from 4 P.M. to 9 A.M., except by persons licensed therefor. 1 Dillon on Mun. Corp., §§ 385, 386 notes, 4th ed. While agreeing with counsel for appella much that is urged on the general question, we find no with the ordinances assailed, and the judgment is—

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Statement of the case.

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CHARLES WEIGHTMAN v. LOUISVILLE, NEW ORLEANS & TEXAS RAILWAY CO.

RAILROADS. *Sick passenger. Negligence. Damages.*

A declaration against a railroad company which alleges that plaintiff's son, being taken seriously ill while from home, was placed on a train of defendant as a passenger, with a ticket, in charge of the conductor, who, with full knowledge of his condition and of the necessity of his speedily reaching home, promised to take care of him, and to assist him from the train if necessary, but that he wholly neglected this; that the youth, while unconscious, was taken past his destination, and was put off in the night at a place where there were no accommodations, and where he remained without attention for forty hours, being finally sent home, and that, as the result of the neglect and exposure, he shortly afterwards died, states a good cause of action. *Sevier* v. *Railroad Co.*, 61 Miss., 8, distinguished.

FROM the circuit court of Warren county.

HON. J. D. GILLAND, Judge.

The declaration in this case alleges that on the eighteenth day of July, 1892, Noel Weightman, the sixteen-year-old son of appellant, while from home, was taken very seriously ill, and was put aboard defendant's train at Arkansas City as a passenger, destined for Vicksburg, Mississippi, the home of himself and parents; that the ticket-agent of defendant was apprised of his condition before the purchase of his ticket, and that the conductor of the train was so apprised, and was informed that he was away from home, with no one to accompany him; that both the ticket-agent and conductor were informed that he would not only need attention along the road, but would also probably have to be carried from the train when he arrived at Vicksburg; that they were fully informed of all the circumstances, and of the reason why appellant's son would go home by railroad, and not by boat, it being deemed important that he should go speedily; that,

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Brief for appellant.

with a knowledge of all the facts, he was received as a
senger on the train, with the promise of the conduct
give him the necessary attention along the journey, a
have him carefully assisted from the train at Vicksb
that when the train reached Vicksburg, young Weigh
was unconscious, and hence unable to help himself, a
that state was suffered to remain on the train until it
reached a point about thirty miles south of Vicksburg, w
he was put off, about two o'clock at night, at a little st
where there were no accommodations; that he was
permitted to remain, without care or attention, for
forty hours, when he was taken back to Vicksburg b
employes of defendant; that, soon after reaching hom
died as a result of the exposure and neglect.

From a judgment sustaining a demurrer to the declar
and dismissing the case, plaintiff appeals.

George Anderson, for appellant.

We are free to admit that the case of *Sevier* v. *Rai*
Co., 61 Miss., 8, on the authority of which the dem
was sustained, is a very strong one. But we recogniz
rule announced in that case, and claim that it does not
here. Plaintiff's son was accepted as a passenger wit
knowledge of his illness, and with the promise on the pa
defendant's employes to give him the proper attention.
company received the benefit of his fare, and cannot e
the obligation imposed upon it by the circumstances o
case. Where a railroad company voluntarily accepts a
senger, one whose physical disability is apparent, or is
known to the employes, rendering special assistance n
sary, the company is negligent if such assistance is not
nished. 2 Am. & Eng. Enc. L., p. 767, § 37, and autho
cited. This is not inconsistent with the rule announc
the *Sevier case*. It is entirely in keeping with the intim
of the court in the last paragraph of the opinion.

The railroad company owes a duty even to a trespass

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he is discovered in a dangerous place or condition, and must respect his circumstances and avoid doing him unnecessary injury. How much more is this true as to one who is a passenger, received under the circumstances averred in the declaration!

By reason of young Weightman's condition, he was unable to leave the train at Vicksburg, and, when the train left there, he should have been put off at a place where he could have received the attention he then needed. Instead of this, he was put off at a place where there were no accommodations, and where he received no care or attention. After about forty hours of exposure and neglect, the employes of defendant, fearing that he would die on their hands, sent him back to Vicksburg. Certainly the company cannot escape liability for such conduct.

Mayes & Harris, for appellee.

This case is completely covered by the decision in *Sevier* v. *Railroad Co.*, 61 Miss., 8. The authorities relied on by opposite counsel have no bearing on the principle announced in that case. They merely have reference to the stoppage of trains at stations in order to give passengers sufficient time to alight.

WOODS, J., delivered the opinion of the court.

The case, on its facts presented by the declaration, is widely different from that of *Sevier* v. *Railroad Co.*, 61 Miss., 8. In that case the plaintiff got on a train of the railroad company at Vicksburg, to be transported to Jackson. Before reaching Jackson, the plaintiff, who had gotten on the train while sick with a fever, notified the conductor of the train that he was sick and drowsy, and wished to sleep, but feared he might not awake at Jackson, his point of debarkation. The conductor thereupon told plaintiff that he might safely go to sleep, and that he should be awakened at Jackson. The plaintiff accordingly lay down and slept, and gave no thought

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to being awake when the train should reach Jackson neither roused himself nor was aroused by the conduct Jackson, but was carried four miles east of that station so asleep and sick, when the train was stopped, the pla permitted to get off at night in the woods, and walk ba Jackson.

In the case at bar, the passenger was received into upon the train by the ticket-agent's and conductor's co and agreement, after having been informed of his seriou ness and his inability to care for himself, and of the n sity there would be, on the railroad's part, to have hin sisted from the car when the train should arrive at V burg, the place of his debarkation. The declaration al that the passenger, "being violently ill, was overcom weakness, drowsiness, and unconsciousness to such an e that when the train upon which he was a passenger arriv Vicksburg, he was totally unconscious thereof;" that conductor negligently failed to have the passenger awak and put off, but permitted him to remain on the train, out any attention or care given him, and carried him small station, called Ingleside, about thirty miles sou Vicksburg, where he was put off the train, about 2 o' at night, where there was no one to take care of him, protect him in his then condition, and he was permitte remain in the depot at Ingleside, without care or atten from 2 A.M. Tuesday to 5 P.M. on the Wednesday followi about forty hours—when he was placed upon a north-b train of defendant's, and carried back to Vicksburg; th thus reaching the house of his father at Vicksburg, me aid was at once summoned, but it was found to be too and he was pronounced to be beyond hope of recovery, very soon thereafter died. It is also alleged that, by re of his having no care and attention during the forty-h he was left at the station-house at Ingleside, he grew much worse, and that death would not have occurred for the negligent, wanton and reckless conduct of defen

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Opinion of the court.

How wide the limits stand between the one case and the other—the case of Sevier and the case of Weightman—the preceding brief statements of fact will vividly make to appear. In the one case, a man, not sick enough to make his condition known before or on entering the train, takes passage, and, before reaching his destination (the whole trip a short one of about forty miles only), tells the conductor that he has fever and is drowsy, and wants to sleep, and secures the conductor's promise to rouse him at Jackson. The conductor — under no sort of obligation, contractual or otherwise, to keep his promise—forgets the passenger until four miles out from Jackson, when he permits the passenger to leave the train and return to his destination. In the other case—the one at bar—the passenger is received into and upon the train after his sick and helpless condition had been made known to the ticket-agent and the conductor, together with the reasons for desiring to have him carried by rail rather than by steamer, and the necessity for the attention of the railway employes on his journey and in his removal from the train at Vicksburg, his point of debarkation, and after their agreement to give him needed care on the way, and to have him carried from the train. He is not cared for or carried from the train, though unconscious at the time, but is carried thirty miles further south, and put off at 2 o'clock A.M. in a little way-side depot, with no one to care for him, and is permitted there to remain, without care or attention, until nearly forty hours later, when he is carried back to Vicksburg to die.

That the wanton, reckless, inhuman conduct of the defendant in putting an almost dying man from its train, under the revolting circumstances set out in the declaration in this case creates liability on the wrong-doer's part, we do not hesitate to affirm. It was the wanton exposure to almost certain death by the railroad company of one not a trespasser —a passenger, to whom it owed a duty; at least the duty which common humanity proclaims, and which the general

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law of civilized Christendom echoes, not to wantonly or r
lessly injure another. Trespassers on trains and tra
wrong-doers and swindling dead-beats, may not be wilf
or wantonly injured, or subjected to imminent risks of de
peril. This humane doctrine is imbedded in our laws;
rooted in all laws of every enlightened kingdom or comm
wealth under the wide circuit of the sun.

Is authority thought to be needful to support so plain
just a rule of conduct? They are at hand, and abund
Says Beach, in his admirable little compendium of The
of Railways: "A railway company must treat such o
passengers as are sick or infirm with humanity and consi
ation." In the case of *Conolly* v. *Railroad Co.*, 41 La. A
57, this rule is declared with emphasis. In the syllabus, w
Fenner, J., who delivered the opinion of the court, appro
it is said: "Although a common carrier of passengers
obligations to its well passengers as well as to those who
sick, and is bound to protect the rights of both, and
though, when the condition of one passenger, from sick
or otherwise, is such as to be inconsistent with the sa
health or even comfort of his fellow-passengers, regard
the rights of the latter will authorize the carrier to termi
the carriage by excluding him; yet, this right cannot be
ercised arbitrarily or inhumanly, or without due care
provision for the safety and well-being of the ejected pas
ger." In this case, the ejected passenger had fallen, help
and almost insensible, to the floor of the car, vomiting
verely. His condition was offensive to other passeng
Thinking him drunk, the car-driver, with the help of a
senger, removed Conolly from the car and laid him dow
the open street, where he remained for four hours, on a b
day in December, and was at length removed by the po
authorities to the hospital, where he died the next day.
erable as is this case on its facts, how far short of the reck
and wanton disregard of all laws displayed in the case at
does it fall!

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Opinion of the court.

In delivering the opinion of the court in the case of *Railroad Co.* v. *Sullivan*, 81 Ky., 624, where it appeared that Sullivan was drunk, and unable or unwilling to pay his fare, and was ejected by the conductor, and exposed to freezing weather, while in a helpless condition, whereby his toes, some of his fingers and part of his heel were frozen, and necessitated their amputation, Lewis, J., said: "The right, generally, of railroad companies to put off their trains persons who refuse to pay their fare when requested by the conductor, may be conceded, but does it follow that this right may be exercised in such manner, under such circumstances or against a person in such mental or physical condition as that death or serious bodily harm will necessarily, or even probably, result from putting him off? It is true that appellee, by refusing to pay his fare, became, technically, a trespasser, but it is well settled that a party may, in some cases, recover for the gross negligence of another, notwithstanding he may have been a trespasser upon the rights of the other at the time he received the injury." See, too, the cases cited by the learned judge in his opinion. To the same effect will be found *Railroad Co.* v. *Moore*, 83 Va., 827; *Railroad Co.* v. *Weber, Adm'r*, 33 Kas., 543; *Railway Co.* v. *Powell, Adm'r*, 40 Ind., 37; *Haley, Adm'r*, v. *Railway Co.*, 21 Iowa, 15; *Railway Co.* v. *Miller*, 19 Mich., 305.

Judgment of court below reversed, demurrer overruled and case remanded for further proceedings.

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Brief for appellant.

A. G. PAXTON v. V. OLIVER.

PROCEEDINGS AGAINST TENANT. *Appeal. Recovery of rent. Code* 1880, §§ 2657.

As § 2657, code 1880, gives a successful plaintiff in unlawful detaine right, on appeal, to recover rent to the time of trial, and § 1343 pro that, in proceedings before a justice of the peace to recover possessi premises from a tenant in arrears for rent, "the right of appeal exist as in cases of unlawful detainer," on appeal to the circuit in such proceedings against a tenant, a successful plaintiff may lik recover rent to the time of trial.

FROM the circuit court of Sunflower county.

HON. R. W. WILLIAMSON, Judge.

Appellee, Oliver, failed to pay the rent for the prem leased from Paxton, who, thereupon, instituted proceed before a justice under § 1333, code 1880, to recover pos sion of the premises, and obtained judgment. The defen gave bond and appealed, remaining in possession. In circuit court plaintiff again had judgment. In additio possession, he sought to recover rents, including the am accrued after suit begun. On objection of defendant, court excluded the evidence as to this. From judgment allowing the recovery of rents, plaintiff appeals.

Southworth, Paxton & Stevens, for appellant.

Section 2657, code 1880, providing for an appeal in c of unlawful detainer, authorizes a recovery of rent by a cessful landlord up to the time of trial. By the provisio § 1343 that an appeal may be taken, in a case like this, in cases of unlawful entry and detainer," the manifest just purpose was to give the landlord, wrongfully depr of the possession of his property, some security for his in case of appeal by the tenant. If this is not the co

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construction, the speedy remedy given the landlord affords a most excellent opportunity for an insolvent and rascally tenant to keep and use property for an indefinite time, without security and in defiance of the owner's rights.

Argued orally by *M. Green*, for appellant.

J. H. Baker and *C. C. Moody*, for appellee.

By a careful examination of § 1333, code 1880, it will be seen that it was not intended to provide a manner for the collection of rent, but simply to give the landlord possession. The remedy is strictly possessory. The procedure is exactly the same, whether against a tenant holding over or one who has made default in the payment of rent, except that in the latter case § 1342 of the code provides that the writ of possession shall not be issued if the tenant shall pay the rent due and all costs, or give security therefor. No matter how much rent may be due, the court cannot give judgment for it.

The last clause in § 1343, code 1880, simply means that the defendant shall have the right to *appeal* on the same terms as are provided by § 2657 in relation to unlawful detainer. If it had been intended that judgment should be rendered for rents, the statute would have provided that all proceedings on appeal should be the same as in unlawful entry and detainer.

The case is tried in the circuit court *de novo*. There are no new issues. The circuit court has no new jurisdiction.

The case is distinguishable from that of *Flanneken* v. *Wright*, 64 Miss., 217. In that case there was an appeal from a decree of the chancery court on jurisdictional grounds. The questions involved here were not passed on.

CAMPBELL, C. J., delivered the opinion of the court.

The effect of the last clause of § 1343 of the code of 1880, in declaring "the right of appeal shall exist as in case of unlawful entry and detainer," was to adopt § 2657 of the

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Syllabus.

code as to the appeal and proceeding with it in the circui
court, and the appellant was entitled, in the circuit court, t
give evidence of rent due at the time of the trial.

Reversed, and remanded for a new tria

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S. S. NEBLETT ET AL. v. R. N. NEBLETT ET AL.

1. WITNESS. *Competency. Estate of decedent. Code* 1892, § 1740.

Complainants are incompetent witnesses to establish their own claim devisees of the original owner of lands against persons who claim und a conveyance from such original owner. Code 1892, § 1740; *Jackson Smith*, 68 Miss., 53.

2. CHANCERY COURT. *Protection of minors. Guardian ad litem. Evidence.*

Although the guardian *ad litem* of minor parties to a suit has filed f them a mere formal answer, it is his duty to object to incompetent tes mony that affects adversely their interest. But, regardless of the fai ure of the guardian *ad litem* to object, the chancery court should, of i own motion, reject such testimony.

3. DEED. *Recording. Presumption of delivery. Evidence.*

The filing of a deed for record is not necessarily a delivery thereof, yet raises a presumption of delivery which cannot be overcome by fra mentary and equivocal evidence.

4. SAME. *Delivery. Presumption from recitals and registration. Evidence.*

In a suit by the remote devisees of the original owner of land to cancel conveyance by him to two sons, recorded thirty years before, the de reciting that the grantor had previously bargained it to them and r ceived the agreed price, the testimony of the widow of one of sa grantees that she never heard him claim under the deed, together wi evidence that the other grantee, as executor of the will of his mothe through whom complainants claim, had collected and distributed t rents under her will, is, of itself, too inconclusive to warrant the ca cellation of the deed.

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Brief for appellees.

SAME. *Evidence. Declarations against interest. Admissibility.*

In such case declarations by one of said grantees, since deceased, as to the non-delivery of the deed, being against interest, are admissible as against defendants claiming under him, but cannot be considered against the representatives of the other grantee, who was not present when the admissions were made. Thus, certain evidence may be competent and controlling as against one class of defendants and incompetent as to others, even where the issue is the same.

PARTITION. *Solicitor's fee. When taxed. Hostile title. Code* 1892, § 3119.

The power conferred by § 3119, code 1892, on the chancery court in partition suits to tax a reasonable fee for the solicitor of complainant should be exercised only where the services of such solicitor were for the common benefit of all the parties. It should not be allowed if there is a real controversy between them, and defendants, in good faith, resist the partition; and where defendants assert a hostile title to a part of the land, it is error, as against them, to tax a fee which includes services in canceling such claim as well as services in the partition. *Hoffman* v. *Smith*, 61 Miss., 544.

FROM the chancery court of Bolivar county.
HON. W. R. TRIGG, Chancellor.
The case is stated in the opinion.

Robert Turnbull and *Frank Johnston*, for appellants.
The evidence in this case is not sufficient to overcome the *rima facie* case made by the registration of the deed.

Charles Scott and *Woods & Woods*, for appellees.
The presumption of delivery raised by the record of the eed cannot stand in the face of the positive testimony to the ontrary. *Bullet* v. *Taylor*, 34 Miss., 708; *Kearney* v. *Jeffries*,) Miss., 685. The overwhelming weight of the testimony that the deed was never delivered, and that no considera-on was ever paid. The grantees never paid taxes on the nd, never claimed or controlled it, and were never heard to eak of the deed. It is shown that Sterling Neblett, Jr., ed without knowing any thing of the deed, and that W. J. eblett never heard of it until two or three years ago. The

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Opinion of the court.

non-delivery of the deed was established by evidence nc fully competent or convincing. If the testimony of othe parties was incompetent, certainly that of William E. Neblet is competent, so far, at least, as the interest derived throug William J. Neblett is concerned. He was not testifying t establish his own claim, or further his own interest, bu directly against both. His deposition cannot be rejected a against Sterling Neblett's heirs, since he was not testifyin to establish his own claim.

At the time the solicitor's fee was allowed, there was n contest, hence, the allowance was proper. So far as the rec ord discloses, all parties were willing to the sale for partitio after the cloud should be removed. It was necessary tha this should be done, so that the lands would bring their fu value. The adult defendants made no objection, and, so fa as the guardian of the minors answered at all, it was by wa of assent, unless it be said that the formal answer of th guardian *ad litem* is an objection. If so, the court can neve allow a fee where there is a minor defendant, because, afte the decree, the minor can take an appeal, and, for the firs time, make objection.

COOPER, J., delivered the opinion of the court.

The appellees and appellants are the children and grand children of Sterling Neblett, Sr., and Ann S. Neblett, h wife. Sterling Neblett, Sr., by his will, devised his estate t his wife, who afterwards devised it in equal portions to the children and grandchildren. The grandchildren, being chi dren of deceased children, were to take *per stirpes*. In h life-time Sterling Neblett, Sr., was the owner of the land described in the bill, and, unless a part of them was conveye by him to his sons Wm. J. Neblett and Sterling Neblett, Jr he died owning them all.

The purpose of the present proceeding is to have the land sold for partition, and also to cancel, as a cloud upon th title, a certain conveyance, of date June 8, A.D. 1857, mad

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by Sterling Neblett, Sr., whereby a part of the land was conveyed to his two sons, W. J. Neblett and Sterling Neblett, Jr. This conveyance was recorded in the proper office on the eighteenth day of June, A.D. 1857; but the complainants aver it was never delivered to the parties named as grantees, or intended to be, and that they never claimed any interest thereunder, but recognized the land therein described as the property of Sterling Neblett, Sr., so long as he or they lived; that, notwithstanding the writing and recording of said deed, Sterling Neblett, Sr., remained in the exclusive possession of the land until his death on the sixteenth day of November, A.D. 1871, having shortly before devised it to his wife, Ann, who was in possession until her death on the second day of August, 1881, having devised it to complainants and the defendants.

The real and only question in controversy is whether the title to the lands described in the conveyance from Sterling Neblett, Sr., to Wm. J. Neblett and Sterling Neblett, Jr., passed to them, or whether the conveyance was only one in form, but not in fact, the lands remaining the property of Sterling Neblett, Sr.

W. J. Neblett died on the fourteenth day of August, 1891, testate, and by his will devised his estate in these lands to his children, among whom is one minor, W. C. Neblett, and who is one of the defendants to the present bill. Sterling Neblett, Jr., died on the thirtieth day of October, 1877, and by his will devised his estate to his children, two of whom—Sallie B. and Lucy—are yet infants. Two of his children, devisees under his will, have since died, leaving as their heirs at law or devisees the following named minor children, who are defendants to this suit, namely: Elise Bagley, Clifton, and Natalie Neblett.

All the parties—complainant and defendant—are non-residents of this state, and, upon publication duly made, decrees *pro confesso* were taken against the adult defendants, and a guardian *ad litem* appointed to represent the infants and pro-

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tect their interests. The answers of the infants, in commo form, were put in by their guardian *ad litem*, and the co plainants proceeded to take proof in support of their bill.

Much of the evidence consists of the testimony of perso who were clearly incompetent to testify against the devise of William J. and Sterling Neblett, Jr. The controversy, to so much of the lands as are described in the conveyan from Sterling Neblett, Sr., to William J. and Sterling Ne lett, Jr., is whether the same are now owned by the devise of Mrs. Ann Neblett, who was the devisee of Sterling Ne lett, Sr., or by the devisees, or their heirs at law or devise of William J. and Sterling Neblett, Jr., the grantees in sa conveyance. The manifest purpose of all evidence for t complainants, as to this question, is to establish their cla to these lands against the estates of the grantees therein, a the adverse claimants were not competent as witnesses. Co 1892, § 1740; *Jacks* v. *Bridewell*, 51 Miss., 881; *Green* v. *M zelle*, 54 *Ib.*, 220; *Jackson* v. *Smith*, 68 *Ib.*, 53.

The guardian *ad litem* disregarded his plain and obvio duty to the infants by failing to object to the testimony the disqualified witnesses. But his failure to object cann be considered as a waiver by the infants of its competenc The infants cannot waive, because of their incapacity; n can the guardian, because it is a violation of his duty. T court, which is the guardian of all minors, should, regardle of the delinquency of its officer, reject, of its own motio all incompetent evidence introduced to affect the estate of minor. *Cartwright* v. *Wise*, 14 Ill., 417; *Long* v. *Mulford*, Ohio St., 484 s.c. 93 Am. Dec., 638; *Rhoades* v. *Rhoades*, Ill., 239; 10 Am. & Eng. Ency. L., 688.

While the primary and principal object of our laws for t registration of conveyances of land is to protect credito and purchasers, a not unimportant purpose is to give streng and security to titles by preserving in an enduring form t evidence of its devolution; and, though the mere recordi of an instrument is not necessarily a delivery thereof, it

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sufficient to give rise to a presumption of delivery, which presumption cannot be overcome by fragmentary and equivocal evidence. In considering the question, it is permissible to look to the contents of the instrument in aid of, or in opposition to the fact of its delivery. *Boardman* v. *Dean*, 34 Penn. St., 252.

It appears from the recitals of the conveyance now under consideration, that the grantor, some months before its date, had bargained the lands therein described to his two sons, at an agreed price, and that this price had been paid to him. If this be true, it was his duty to execute the conveyance. In seeking to discover the intention of parties, it is far safer for courts to rely upon their assertions and statements, made at the time and reduced to the most solemn and stable form of writing, than to explore uncertain and disconnected circumstances, remote in time and occasion, and, from such circumstances, to reason back to the transaction, and thus discover its nature. So far as the evidence relates to the claim of Sterling Neblett, Jr., under the conveyance, it consists, principally, of the testimony of his widow, who states that she never heard him claim any interest in the land except as a co-tenant with the *other children.*

The evidence against the representatives of William J. Neblett is far stronger and more satisfactory. He was the executor of his mother's will, and, as such, received and distributed the rents of the entire farm among those entitled thereto under her will. A short time before his death, he was informed of the recorded deed, and sent to his attorney for a copy thereof, and stated that he had never before known of its existence; that it had never been delivered; that he had never paid the purchase-price, and it would be unjust to claim under it against the other children. He also stated, however, that there had been an agreement for the purchase of the property by himself and his brother, Sterling Neblett, Jr.

The transaction is an old one, between persons who were non-residents of the state, and who are now all dead.

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Opinion of the court.

Sterling Neblett, Sr., lived until the year 1871—fourte years after the recording of the conveyance—and his tw sons, the grantees, survived him, the one, Sterling, for s years, and the other, William J., for twenty years. It passing strange, if the conveyance was only intended as temporary one, and the title was to be reconveyed to t grantor, that no steps were taken during all this time to store it to the grantor during his life, or to the widow, devisee, after his death. We are impressed with the conv tion that we should be proceeding upon conjecture only, as against the representatives of Sterling Neblett, Jr., should, upon this inconclusive testimony, annul the conv ance.

We cannot assent to the suggestion of counsel that eff shall be given to evidence incompetent as against the rep sentatives of Sterling Neblett, Jr., because it is competent against the representatives of his co-grantee, William J. N lett. What William J. Neblett said as to the non-deliv of the conveyance, is admissible against his representativ because it is an admission against his interest, but such missions cannot be considered as against the representati of Sterling Neblett, Jr., who was not only not present wh they were made, but had been dead for several years. Thou the same issue is presented as to the representatives of ea it may be decided against those of one of the grantees, in favor of those of the other, according to the proof of n delivery of the conveyance made by evidence compet against the respective representatives. The fact that s non-delivery was established against one set of represen tives, by evidence competent as to that class, can have weight as against the other class, as to whom such evide is incompetent; otherwise, effect would be given, indirec to evidence incompetent if offered for the direct purpos establishing the fact it tends to prove.

The court below allowed a fee of $2,500 to the solicito complainants. This allowance was made under § 3119, c

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1892, which provides as follows: "In all cases of the partition or sale of property for division of proceeds, the court may allow a reasonable solicitor's fee to the solicitor of the complainants, to be taxed as a common charge on all the interests, and to be paid out of the proceeds in case of a sale, and to be a lien on the several parts in case of partition."

In *Potts* v. *Gray*, 60 Miss., 57, and *Hoffman* v. *Smith*, 61 *Ib.*, 544, we held that the solicitor's fee provided for by the code should be allowed only when the services of complainant's solicitor were for the common good of all parties in interest; that the purpose of the statute is to "give the court discretion, to be exercised to effect justice by imposing the reasonable cost of a common benefit on all who share it." (Campbell, C. J., in *Hoffman* v. *Smith*.) It was further said in that case that the statute "was particularly designed for cases in which some of the owners in common of land proceed for partition, and the proceeding, not resisted by the others, is conducted by the solicitor of the complainant without any other solicitor being engaged in the cause. But it is not limited to those. The power to allow a reasonable solicitor's fee exists 'in all cases of the partition or sale of property for division of proceeds.' It should be exercised with caution, and be confined, as nearly as possible, to the class of cases for which it was designed—*i. e.*, those in which there is no contest between the parties to the suit, and therefore no necessity for the defendants to have counsel of their own. If there is controversy between the parties, and propriety in the defendants being represented in the cause by their own counsel, they should not be required to pay the counsel of their adversary, who antagonized their interest in the suit. To allow a fee to the solicitor of the complainant in such a state of case, is an abuse of the discretion conferred by the statute." *Hoffman* v. *Smith* was a case in which no other controversy existed between the parties than that of the propriety of decreeing partition, and yet, because it was evident that the defendants resisted the application in good

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faith, an allowance of a solicitor's fee was overruled. In th present case there is a real controversy as to whether a co siderable portion of the land is owned by the representativ of Sterling Neblett, Sr., or by those of W. J. Neblett a Sterling Neblett, Jr. It is evident that the fee allowed w intended as compensation to complainants' solicitor for services rendered by him in the litigation, as well those f procuring cancellation of the conveyance from Sterling Ne lett, Sr., to Wm. J. and Sterling Neblett, Jr., as for securi the order of sale for partition. An examination of the re ord discloses a great volume of testimony directed to th question, and of course a correlative amount of profession labor, while as to the propriety of the sale for partition, the appears but little room for controversy. It cannot be th the statute was intended to fix upon the defendants, claimi in good faith a hostile title, the burden of paying the fee the solicitor of their successful adversaries for his services defeating this title.

In view of the fact that the cause was tried in the cou below without any objection having been made to the incon petent testimony introduced by the complainants, which have rejected, we think it improper to render a final decr here, but will remand the cause, with leave to all parties take further proof if they so desire.

Reversed and remande

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Statement of the case.

B. F. MUSE v. L. E. RICHARDS.

1. EJECTMENT. *Proof of title. Patent. Certificate from land-office.*

A plaintiff in ejectment who introduces a patent from the state for the *locus in quo*, which is therein referred to as swamp-land, donated to the state by the act of congress of September 28, 1850, together with a certificate from the general land-office, showing that it is included in the list of swamp and overflowed lands inuring to the state under said act, without other proof, makes out a case. *Fore* v. *Williams*, 35 Miss., 533; *Dowd* v. *Railway Co.*, 68 *Ib.*, 159.

2. SAME. *Evidence. Locus in quo. Identification. Admission.*

In ejectment, where plaintiff's evidence describes the *locus in quo* by section, township and range, but fails to show whether the range is east or west, if the defendant offers to prove that the land in controversy was sold for taxes and purchased by him, this is an admission that the land is the same as embraced in his proffered deed, and obviates the necessity of any further identification.

3. DESCRIPTION OF LAND. *Government survey. Judicial notice.*

In ejectment, identification of the land as "lot 9, section 28, township 9, range 5, Madison county, Mississippi, containing 40.30 acres," is sufficient. The court takes judicial notice that, according to the United States government survey, the range is east in this instance, and it is unnecessary to prove this.

FROM the circuit court of Madison county.

HON. J. B. CHRISMAN, Judge.

Ejectment by appellee against appellant. On the trial plaintiff introduced in evidence a patent from the state of Mississippi, executed February 12, 1891, in which the land in controversy was conveyed to her. Among other things, the patent recites certain acts of the legislature "relative to swamp-lands donated to the state under act of congress dated September 28, 1850." This recital precedes the granting clause in the patent. Plaintiff then introduced in evidence a certified transcript from the list and certificate of the com-

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Brief for appellant.

missioner of the general land-office, said certificate being a follows:

"GENERAL LAND OFFICE, July 20, 1853.

"I, John Wilson, commissioner of the general land-office do hereby certify that the foregoing is a true copy of list No 1 of swamp and overflowed land selected as inuring to the state of Mississippi under the provisions of the act of congress approved September 28, 1850, in the district of land subject to sale at Columbus, Mississippi, taken from the original on file in this office, which was, on the twenty-ninth day of June, 1853, approved by the secretary of the interior."

The land in controversy is described in the declaration as "lot 9, section 28, township 9, range 5 east, Madison county, Mississippi, containing 40.30 acres." It is described in the same way in the patent from the state and in the certified list above mentioned, except that it does not appear in either whether the range was east or west. Plaintiff introduced no other evidence. Thereupon, the defendant offered to introduce a deed from the state of Mississippi to himself. This deed is not set out in the record, but the bill of exceptions recites that it was a deed "comprising the land in controversy." Defendant offered to show that this land was legally assessed for taxes in 1876, and was sold to the state for the non-payment of said taxes on March 5, 1877, and that it was purchased from the state by defendant November 2, 1886. Plaintiff objected, on the ground that the land was not liable to taxation, and this evidence of the defendant, including the deed, was excluded. Certain testimony of defendant, offered to show the value of the improvements placed upon the land was also excluded. Thereupon, the court gave to the jury a peremptory instruction to find for plaintiff, which was done and judgment was entered accordingly. Plaintiff appeals.

W. H. Powell, for appellant.

Plaintiff's evidence is insufficient. There is no evidence that the land sued for was swamp and overflowed land, and

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Opinion of the court.

no proof of its location as required by law. Plaintiff wholly failed to make out her chain of title. The judgment should have been for defendant. See *Fore* v. *Williams*, 35 Miss., 533; *Funston* v. *Metcalf*, 40 *Ib.*, 504; *Dowd* v. *Railway Co.*, 68 *Ib.*, 159.

The proof fails to show whether the range in which the land is situated is east or west. On this point, see *Caruthers* v. *McLaran*, 56 Miss., 371.

Downs & Ward, for appellee.

The evidence entitled plaintiff to a recovery. The judgment is right. *Fore* v. *Williams*, 35 Miss., 533.

WOODS, J., delivered the opinion of the court.

There was no error in the action of the learned court below in peremptorily instructing the jury to find for the appellee. Her evidence met, substantially, every requirement of law as declared in our adjudications from *Fore* v. *Williams*, 35 Miss., 533, to *Dowd* v. *Railway Co.*, 68 *Ib.*, 159.

It is true that the certificate of the commissioner of the general land-office, of date July 20, 1853, describes the lot as in range 5, simply, without the addition of the word east or west; but this cannot avail to reverse the judgment complained of. The appellant removed the necessity for proof by appellee that the lands were in range 5 east, by his admission, on offering his tax-deed from the auditor, that the lands involved in the controversy were identical with those in his proffered deed. But, quite independently of this, the courts will take judicial knowledge of the fact that there is but one lot 9, section 28, township 9, range 5 in the surveys of the United States government in what is known as the Columbus land district in this state, and that said range is east, and that there is no such range west. This fact is matter of common, not to say universal, knowledge and concern touching an official, governmental act, of which the courts must take knowledge.

Affirmed.

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Statement of the case.

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G. W. JOURNEY v. W. M. PRIESTLY.

1. CONDITIONAL SALE. *Undivided interest. Reservation of title. Notice.*

Where one, having as partner an undivided interest in personal property sells the same, reserving title to secure payment of the price, the transaction is legitimate, and no record of it is necessary in order to affect with notice purchasers from the vendee. They must beware. *Duke v. Shackleford*, 56 Miss., 552.

2. CHANCERY JURISDICTION. *Partnership interest. Enforcing demand.*

In such case, the subject of the sale, being an undivided interest in a partnership, the seller, in order to enforce payment of his demand, cannot seize the goods by action at law, and may resort to equity.

FROM the chancery court of Madison county.

HON. H. C. CONN, Chancellor.

G. W. Covington and G. W. Journey were partners, conducting a livery-stable business at Canton, Miss. The partnership effects consisted of horses, vehicles and other personal property. Journey owned an undivided one-third interest in the business, which, on January 18, 1892, he sold to B. F. Billingslea, who became the partner of Covington, and the business was continued under the firm name of Covington & Billingslea. For the interest so purchased, Billingslea paid Journey $1,000 cash, and gave him his promissory note for $880, the balance of the purchase-money, payable January 1, 1893. The note contained a stipulation that it was for the "purchase-money of one-third interest in the livery business styled Covington & Journey, this day sold said Billingslea, the title to which interest is hereby reserved and retained in G. W. Journey and his assigns until this note is paid in full." It was not acknowledged or recorded. When the purchase was made, Billingslea took possession, and, with Covington, continued the business. Subsequently, Billingslea sold his one-third interest in the business to appellee, W. M. Priestly

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Brief for appellee.

who purchased and paid for the same without notice of Journey's claim. Thereupon, the business was continued by Covington & Priestly. Afterwards, Journey filed the bill in this case, setting up the facts above stated, and averring that the note executed by Billingslea was due and unpaid, and prayed that the undivided one-third interest in said partnership effects, sold by Billingslea to Priestly, should be subjected to the payment of said note. From a decree sustaining defendant's demurrer to the bill and dismissing the case, complainant appeals.

F. B. Pratt, for appellant.

Under the contract, the title to the property sold was retained in Journey as security for the unpaid purchase-money. *Duke* v. *Shackleford*, 56 Miss., 552; *Dederick* v. *Wolfe*, 68 *Ib.*, 500. Having title to the property, complainant had the right to subject it in satisfaction of his debt. But, the interest being undivided, he could not resort to an action at law to get possession, and, hence, the chancery court had jurisdiction. Replevin would not lie in such case. Wells on Replevin, 154; *Hoff* v. *Rodgers*, 67 Miss., 208.

W. H. Powell, for appellee.

The demurrer was properly sustained. If the intention of Journey was to retain title, his remedy at law by replevin was adequate.

The note recites that a one-third interest in the business was reserved. This amounts to nothing, if it be not a lien to secure the purchase-money. It was not recorded. Priestly was a *bona fide* purchaser, and is protected. There is no equity in the bill.

The cases of *Ketchum* v. *Brennan*, 53 Miss., 596, and *Duke* v. *Shackleford*, 56 *Ib.*, 552, are not applicable. The whole scope of the bill is to foreclose a mortgage or enforce a lien. As against Priestly, complainant is not entitled to relief.

To give notice to the world, it is necessary that the instru-

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ment should have been acknowledged and recorded. *Deder ick* v. *Wolfe*, 68 Miss., 500; *Tufts* v. *Stone*, *ante*, 54. Liens mortgages and trusts must be acknowledged and filed fo record to affect purchasers with notice. The court will loo through the form of the transaction, and ascertain the inte tion of the parties.

CAMPBELL, C. J., delivered the opinion of the court.

The transaction between Journey and Billingslea was conditional sale, in which the title of the thing sold was re served by the seller until the note for unpaid price should b paid. It was a legitimate transaction, sanctioned by law, o very frequent occurrence, and not required to be made o record, but valid without, and purchasers from the vendee i such case must beware, for he cannot give a better title tha he has by his contract with the vendor. *Ketchum* v. *Brennan* 53 Miss., 596; *Duke* v. *Shackleford*, 56 *Ib.*, 552.

'If the subject of the sale had been specific chattels, Jour ney could have maintained replevin or other action at law for the goods; but, as the thing sold was an undivided inter est in a partnership, he properly resorted to chancery to en force his unquestionable rights, because he has no remedy a law.

Reversed, demurrer overruled and cause remanded for answe in thirty days after mandate filed, as of last term of chancer court.

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Statement of the case.

FIRST NATIONAL BANK OF GREENVILLE ET AL. v. COOK CARRIAGE CO.

1. SALE. *Reservation of title. Agreement to give note.*

Under an agreement by which the purchaser of personal property is to settle promptly, on receipt of bill of lading, by note or draft payable in four months, or in cash within ten days, at an agreed discount, there is no reservation of title in the seller, and, although the terms be not complied with, the title passes by delivery, and the seller cannot maintain replevin for the property as against one who has bought from the purchaser.

2. SAME. *Fraud of buyer. Title. Bona fide purchaser.*

Although the purchaser improperly, or even fraudulently, obtained such property, not intending to pay for it, or to execute his note as agreed, one who buys the property from him in the usual course of trade, without notice, and before any steps are taken by the original owner to reclaim it, acquires a perfect title.

FROM the circuit court of Washington county.

HON. R. W. WILLIAMSON, Judge.

Appellee is a wholesale dealer in carriages and other vehicles, and in 1891, through its agent, sold and shipped to J. C. Head & Co., retail dealers in Greenville, Miss., a delivery-wagon and rockaway, the title to which is involved in this action. The sale and shipment were made pursuant to a written contract, signed by J. C. Head & Co., which, after describing the two vehicles, contains the following stipulation: "The subscribers agree to settle promptly, by note or bill of exchange on Cincinnati or New York, on receipt of bill of lading, in accordance with the following terms: 50 and 10 off 4 mos., and 5 per cent. more off for cash in 10 days from date of shipment." The vehicles were received in due course, but the purchasers failed to pay the cash in ten days, or to execute notes or give their acceptances for the price as agreed, and they have never complied with this part

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Brief for appellee.

of the contract, though frequently requested to do so by appellee. The wagon was sold by Head & Co., in the usual course of business, to Dan Head, and the rockaway to the First National Bank of Greenville, both purchases being for value without notice. Subsequently, appellee made demand on the bank for the vehicles, and the bank, while admitting possession, refused to deliver them. Whereupon, appellee brought this action of replevin. Dan Head interposed a claim for the wagon, and the whole case was, by agreement, submitted to the court without a jury, and judgment was rendered for the plaintiff on both issues. The bank and Dan Head have appealed.

Jayne & Watson, for appellants.

1. It is not denied that appellants were innocent purchasers for value of the vehicles. The contract did not create a conditional sale. The only condition named was that the subscriber agreed to settle promptly by note or draft, or to pay cash within ten days. The purchasers had the option of paying the money or giving the note. The vendor nowhere retained title.

2. Appellee was a wholesale manufacturer of carriages, and knew that its vendee, J. C. Head & Co., were retail dealers in them, and that these vehicles were purchased for sale. Appellants were innocent purchasers. As between wholesale and retail dealers, secret liens or reservations of title in conditional sales will not be permitted, as they operate as a fraud on the purchasing public. 109 Ind., 31; 6 Daly, 305; 31 Barb., 650; 4 N. Y., 518; Benjamin on Sales, § 319; 58 Ala., 165.

Phelps & Larkin, for appellee.

The condition upon which title was to vest in the purchasers was never performed, and appellee had the right to reclaim its goods. The fact that notes were exacted of the purchasers upon delivery, as the condition of the sale, does

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not render it less a conditional sale. Appellee had the right to stipulate for promissory notes as a prerequisite to the sale. These might be of great importance to appellee in its business.

The authorities holding such sale to be conditional, and that the seller has a right, upon non-performance of the condition, to retake possession, are found in 1 Benjamin on Sales, §§ 335–348. See 60 Me., 48; 100 Mass., 515. Since J. C. Head & Co. had not acquired any title, they could transfer none to appellants. 1 Benjamin on Sales, § 362; *Ketchum* v. *Brennan*, 53 Miss., 596; *Duke* v. *Shackleford*, 56 *Ib.*, 552. Under the facts, it cannot be contended that appellee is chargeable with any purpose to assist in the promotion of a fraud. It never waived the condition in the sale, and cannot be deprived of the legitimate stipulation it made for its protection.

WOODS, J., delivered the opinion of the court.

It is impossible to bring our minds to the conclusion that the sale of the rockaway and delivery-wagon by the appellee to J. C. Head & Co. was a conditional sale, and that there was a retention of title by appellee. Those provisions in the contract of sale which counsel for appellee construe to be conditions for passing of title, are merely the terms of the sale. The sale was perfect, complete, and the title to the property was clearly in J. C. Head & Co. from the date of shipment. Grant that J. C. Head & Co. improperly, or even fraudulently, obtained title, never intending to pay cash at the end of ten days, or to give their note at four months, and still it remains true that there was a sale of the property, by which they obtained title. It is not open to dispute that such sales are not absolutely void, but are voidable only at the election of the party imposed upon. It follows, irresistibly, that if J. C. Head & Co., the vendees, while in possession of the goods, and in the usual prosecution of their business as retail dealers in vehicles, and before the carriage company

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Statement of the case.

had taken any steps to disaffirm the improperly, or fraudulently, made contract of sale, sold the rockaway and delivery-wagon to a purchaser in good faith, for value, such sale will be valid as against the carriage company.

Reversed.

L. B. HOLLY ET AL. v. CATHERINE COOK.

1. CHANCERY COURT. *Set-off. Judgment. Assignment.*

Where, pending an action, defendant therein recovers a judgment against plaintiff, the latter, after recovering his judgment, cannot maintain a bill in chancery to compel the setting off of the two judgments, if, before such recovery by plaintiff, defendant had assigned his judgment.

2. SET-OFF. *Judgments. Assignment. Notice. Code* 1880, § 1124.

In such case, it is immaterial that, when plaintiff recovered his judgment, he had no notice of such assignment by defendant. Section 1124, code 1880, providing for the assertion of off-sets and other defenses against notes and other writings for the payment of money had prior to notice of their assignment, has no application to judgments.

FROM the chancery court of Harrison county.

HON. W. T. HOUSTON, Chancellor.

In 1887, appellee, Catherine Cook, recovered a judgment against L. B. Holly for $100 in an action of slander. While her action was pending, Holly instituted a suit against her for slander, and likewise recovered judgment for $25. In April, 1892, an execution issued on the last-mentioned judgment, and was levied upon a house owned by Mrs. Cook, the defendant. To prevent her place being sold, she paid into the officer's hands the amount of the judgment against her, and costs; but, as her judgment against Holly was still unsatisfied, she filed this bill against him and the officer, reciting the facts, and asking that the money in the hands of the officer be refunded to her, and that her judgment against Holly be set off against his judgment, by having the amount

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Brief for appellees.

hereof credited upon her judgment, and that Holly be njoined from attempting further to enforce his judgment gainst complainant. Subsequently, complainant filed an mended bill, alleging that R. Seal, J. R. Davis and J. L. Henley were asserting a claim to the money in the hands of he officer, and they were joined as parties defendant. The ast-named defendants demurred to the bill, but the demurrer as overruled. They then answered, alleging that they were he owners of the judgment for $25, Holly having assigned to them for value soon after its rendition.

The case was then submitted for hearing upon an agreed tatement of facts, in which it was admitted that Holly ad, in writing, assigned his judgment to Seal, Davis and Henley, for a valuable consideration, before Mrs. Cook re-overed her judgment, and that the justice of the peace had een notified of the assignment, and asked to note the trans-r on his docket, but no entry had been made, nor did the dgment-roll show the assignment. It was further admitted hat Mrs. Cook had no notice of the assignment until after he judgment in her favor was rendered. Decree was ren-ered in favor of complainant, granting the relief prayed for her bill, and defendants, Seal, Davis and Henley, have ppealed.

R. Seal, for appellants.

W. A. White, for appellees.

The rule of *caveat emptor* applies to the purchase of judg-ents as well as personal property, and set-off or other de-nses existing prior to notice of assignment can be asserted. Vithout notice of the assignment, Mrs. Cook expended her me and money in prosecuting her action to judgment, and, aving secured a valid set-off to the judgment against her, annot be deprived of her rights by an assignment of which he had no notice. *Sherman* v. *Bank*, 7 How., 386; *Shields* *Taylor*, 25 Miss., 13; 12 Am. & Eng. Enc. L., 149; Bar-

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Opinion of the court.

bour on Set-off, 67; 7 Lawson's Rights, Rem. & Pr., 5420
2 Pom. Eq. Jur., 154. See also *Cox* v. *Palmer*, 60 Miss., 79

CAMPBELL, C. J., delivered the opinion of the court.

When Holly's judgment was recovered against the appe
lee and assigned, she had no claim against him which coul
be set off against this judgment, at law or in equity. Whe
she obtained judgment against Holly, the judgment he ha
before against her had been assigned, and was not his, an
she was not then entitled to have Holly's judgment credite
on hers against him. The fact that she got judgment agains
him before she learned of his transfer of the judgment agains
her, does not make any difference. Our "anti-commercia
statute" does not apply. Judgments are not embraced b
it, and we have no statute as to setting off judgments; tha
rests on common law rules, and, under them, the appellee wa
not entitled to the decree she got. The assignment of hi
judgment by Holly defeated her claim to use the judgmen
she afterwards obtained to pay the other judgment. 2 Blac
on Judgments, § 954 and cases cited in notes; Waterman o
Set-off, §§ 368, 369, 373.

Reversed, and bill dismissed

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Brief for the state.

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ABNER YARBROUGH v. THE STATE.

ARGUMENT. *Failure of accused to testify. Comment. Code* 1892, § 1741.

Section 1741, code 1892, declaring that "the failure of the accused, in any case, to testify shall not operate to his prejudice, or be commented on by counsel," is imperative in forbidding any and all comment, friendly or unfriendly, as to such failure; counsel may not even call the attention of the jury to the fact.

AME. *Admonition. Failure of counsel to heed. New trial.*

Where counsel for the state refers to the failure of the accused to testify, and, being admonished by the court, continues the comment to the extent of stating an alleged reason for it, a new trial will be granted; and this without regard to the character of the comment.

FROM the circuit court of Winston county.

HON. A. G. MAYERS, Judge.

Appellant was convicted of murder, and sentenced to the itentiary for life. The opinion contains a sufficient statent of the case to indicate the point decided. To this statent it may be added that there was testimony tending to ow certain confessions made by the accused, and evidently was to this testimony counsel for the prosecution was uding when he was interrupted by the court as shown in opinion.

No counsel for appellant.

Frank Johnston, attorney-general, for the state.

While it may be true that the statute was technically vioed by the action of counsel for the state in alluding to the lure of the defendant to testify, the error is unquestionably thout prejudice. The record shows that, by his voluntary nfessions, the accused had sealed his own doom. The re-

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mark by counsel could not possibly affect the result. No other verdict than that of guilty was possible. On this point, see *Lamar* v. *State*, 65 Miss., 93.

WOODS, J., delivered the opinion of the court.

In his argument of the case before the jury, one of the attorneys for the prosecution used this language, viz.: "Defendant has not taken the stand, which is his privilege under the law, and no inference can be drawn from the fact—," when the court interrupted counsel, and directed him not to make any comment. The counsel then resumed his address, and said: "Unfortunately for the defendant, he has not, in this case, for he has immolated himself on an altar of his own erection." This failure of counsel for the state to heed the presiding judge's admonition, and his persistent disregard of a plain requirement of law, must reverse this case, and secure to the appellant a new trial.

The statute declares that "the failure of the accused, in any case, to testify shall not operate to his prejudice or be commented on by counsel." The word "comment," as employed in the statute, does not mean to criticise or condemn or anathematize the accused on his failure to testify. It forbids, in unmistakable language, any comment, friendly or unfriendly. It forbids any remark, of any character, in any words, upon the failure of the accused to testify. The attention of the jury is not to be called to the fact at all by counsel.

In this case, comment was made; criticism was indulged. The failure of the accused to testify was pointed out to the jury, and, on admonition from the court that the counsel was on forbidden ground, counsel proceeded to inform the jury that the failure to testify by the defendant was unfortunate for him, "for," said the counsel, giving a reason for declaring the accused's course unfortunate, "he has immolated himself upon an altar of his own erection."

But, quite independently of the character of the comment, the statute forbids the comment itself. The failure of the

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Statement of the case.

accused to testify shall not operate to his prejudice, nor shall it be commented upon, remarked upon at all, by counsel. Comment was made—unfriendly comment, too—and prejudice may have been made operative against the accused, and so he has not had the trial to which he was entitled under the law.

Reversed and remanded.

NOTE.—After the decision of this case, and after the expiration of the term of court, upon a corrected transcript being furnished, it was discovered that, in copying the bill of exceptions, the words "*been silent*" following the words "has not," in the last sentence quoted by the court as the language of counsel, were inadvertently omitted. Owing to this omission, it would appear from the record that, after being admonished by the court, counsel persisted, and, in effect, said: "Unfortunately for the defendant, he has not testified in this case;" whereas, what he did say, as now appears, was this: "Unfortunately for the defendant, he has not been silent in this case, for he has immolated himself on an altar of his own erection," referring, evidently, to certain confessions alleged to have been made by the defendant. This explanation is made by direction of the court, in justice to counsel.—REPORTER.

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GEORGE WILSON *v.* THE STATE.

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INDICTMENT. *Attorney before grand jury. Improper influence.*

Where an attorney, who, though not employed to prosecute, goes before the grand jury, and, as a private prosecutor—not a witness—uses his influence in furtherance of a presentment, which is made, the indictment will be held invalid. *Durr* v. *State*, 53 Miss., 425; *Welch* v. *State*, 68 *Ib.*, 341.

FROM the circuit court of Lee county.

HON. NEWNAN CAYCE, Judge.

Appellant was convicted of forgery. The indictment alleged that the forgery was committed for the purpose of defrauding the Postal Telegraph-Cable Company. The defendant filed a plea in abatement, alleging that J. L. Finley, the attorney for said telegraph company, who had been employed

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Brief for appellant.

to aid in the prosecution, went before the grand jury with witnesses, and acted for the district attorney in preparing the indictment, and procured the same to be found and presented; that the district attorney was not present in the grand jury room when said indictment was found; that Finley had not been selected as assistant district attorney or district attorney *pro tem.*, and was in nowise connected with the case, except that he was the attorney of the telegraph company, and, as such, assisted in the prosecution of defendant.

On the trial of the issue presented by the plea in abatement, the main allegations thereof were proved. J. L. Finley testified that he was assisting the district attorney in the prosecution of the case, but was not employed to do so by the telegraph company; that he was employed by said company to defend certain civil suits for damages growing out of prosecutions against the defendant; that he was not sworn as a witness, and did not testify before the grand jury, but told one of the grand jurors what witnesses to summon; that he prepared the indictment in this case, and another against the defendant for perjury, but was not employed by any one to prosecute; that he conferred with the district attorney, and was in the grand jury room in reference to the case at his request; that he used no undue influence to induce the grand jury to return the bill. Two of the grand jurors testified to the fact of Finley's presence in the jury-room. Each of them testified that he was not influenced in his action by Finley's statement, and one of them stated that he did not think the grand jury was so influenced.

Under the instruction of the court, the jury found against the defendant upon this issue. Being finally convicted, he prosecuted this appeal. The opinion contains a further statement of the case.

Clarke & Clarke, for appellant.

Without argument of the facts in respect to the trial of the

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Opinion of the court.

issue raised by the plea in abatement, and without discussion as to the propriety of a peremptory instruction against the accused at any stage of the prosecution, we submit that the action of the court as to this was improper, and that, for this error alone, the judgment must be reversed. *Durr* v. *State*, 53 Miss., 425.

Calhoon & Green, on the same side.

Frank Johnston, attorney-general, for the state.

COOPER, J., delivered the opinion of the court.

The court erred in instructing the jury to find for the state upon the issue joined upon the defendant's plea in abatement. On the facts disclosed in evidence, the verdict on that plea should have been for the defendant. It is unquestionably shown that Mr. Finley, who was the attorney for the telegraph company alleged to have been defrauded, or attempted to be, by the forgery charged against the defendant, was before the grand jury as a private prosecutor, for the purpose of securing the indictment of the accused. It is true Mr. Finley states that he was not employed by the company in the prosecution. He testified: "I did it of my own motion. I was interested in seeing this defendant convicted, because I thought he was a great scoundrel."

It is a serious mistake to suppose that the right of one accused or suspected of crime to the orderly and impartial administration of the law begins only after indictment. Immunity from prosecutions for indictable offenses, except by presentment by the grand jury, is declared and preserved by the organic law of this and all the other States, and, though, by reason of the secrecy of the proceedings before that body, its action is seldom brought in review, it cannot be doubted that one whose acts are there the subject of investigation is as much entitled to the just, impartial and unbiased judgment of that body as he is to that of the petit jury on his final trial, nor that it is as essential before the one body as

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the other that private ill will or malevolence shall be excluded.

The candid statement by Mr. Finley that he went before the grand jury because he thought the appellant to be a great scoundrel, and therefore desired his indictment and conviction, presents the precise reason why he should not have gone before the jury, for it is just such influences the law forbids. He was not a witness before that body, and was not an officer having any duty to perform touching the matter under examination. His purpose must have been to advance in some way the prosecution; and this is precisely what the law prohibits to be done. The case is covered by the decision in *Durr* v. *State*, 53 Miss., 425; *Weleh* v. *State*, 68 *Ib.*, 341.

The judgment is reversed, and cause remanded for a new trial.

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J. L. WEST *v.* THE STATE.

1. LIQUORS. *Sale without authority of law. Indictment.*

An indictment is good which charges, generally, a sale of liquor without authority of law. *Norton* v. *State*, 65 Miss., 297.

2. SAME. *Local option law of* 1886. *Indictment. Allegation of election.*

Tested by the law in force before the code of 1892 went into effect, a count in an indictment for selling liquor in violation of the local option law of 1886, which fails to aver that said law had been put in force by an election in the county, is bad. *Norton* v. *State*, *supra*.

3. SAME. *Code* 1892, *ch.* 37. *When taking effect. Unlawful retailing.*

Chapter 37, code 1892, entitled "Dram-shops," except as to license obtained after April 2, 1892, was not in force until November 1 following, and has no influence on indictments for unlawful retailing found before the chapter took effect.

4. CRIMINAL PROCEDURE. *Indictment. One count good. Conviction.*

A demurrer to an indictment containing one good count is properly overruled; and so of a motion in arrest. But a conviction will not be sustained if the evidence fails to support the good count.

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Statement of the case.

5. CRIMINAL LAW. *Construction of statute. Import of words.*

In construing a criminal statute, it is inadmissible to give to words a meaning they do not contain, in order to accomplish an object it may be supposed the law-maker had in view.

6. SAME. *Laws* 1890, *p.* 71. *Selling liquors. Receiving order.*

Accordingly, on the trial of an indictment under § 2 of the act of 1890 (Laws, p. 71), the words "to *sell* any such liquors as are therein prohibited," will not be held to include the mere receipt of an order for liquor to be thereafter sent into the forbidden territory, though it was so sent, and the defendant received pay for the same.

FROM the circuit court of Pike county.

HON. W. P. CASSEDY, Judge.

Appellant, West, was convicted of unlawful retailing. The indictment, in the first count, charges that he did, on the fifteenth day of December, 1892, in the county of Pike, unlawfully sell vinous and spirituous liquors, he not then and there having any authority so to do. The second count charges that the said West, on the day aforesaid, being a citizen of Louisiana, "did come into the county of Pike, state of Mississippi (the sale of liquors being prohibited by law in said county), and did then and there, in said county, unlawfully solicit orders for the sale of vinous, malt and spirituous liquors, to be shipped from the state of Louisiana to said Pike county, and, by virtue of said orders for sale, did unlawfully ship, and cause to be shipped, from said state of Louisiana, in the said county of Pike, contrary to the statute," etc.

The defendant demurred to the indictment, on the ground that it failed to set out the result of the local option election in Pike county, and, generally, on the ground that no offense was charged. The demurrer was overruled. After conviction, he filed a motion in arrest of judgment, on the ground that the conviction was had in violation of the constitution of the United States, regulating interstate commerce, and this was overruled.

There was no evidence of a sale in Pike county. The testimony showed that the defendant resided in New Orleans,

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La., where he was engaged in, or connected with, the liquor business. At different times he was in Pike county, and received orders from persons therein for whisky, which his house afterwards shipped from New Orleans. On one occasion, he had samples of liquor with him, and solicited an order for whisky, which was filled, and he afterwards received pay therefor. All this occurred prior to April 1, 1892, the indictment being found September 17, 1892.

T. McKnight, for appellant.

The demurrer to the indictment should have been sustained. *Norton* v. *State*, 65 Miss., 297.

It was necessary to show that there had been a local option election in Pike county, and its result. Section 1621, code 1892, did not dispense with this, because it did not go into effect until November 1, 1892. See §§ 2 and 1623 of said code.

There is no proof to sustain the first count, and the second count is not good. Besides, the evidence showed that all the acts occurred prior to April 1, 1892. The second count being insufficient, proof under it was of no avail.

Frank Johnston, attorney-general, for the state.

1. If § 1621, code 1892, was in effect, the court below properly held that it was not necessary to show by proof the result of the local option election in Pike county. This matter is submitted for the consideration of the court.

2. The offense of soliciting orders for whisky to be shipped into Pike county, was sufficiently alleged and abundantly proved.

CAMPBELL, C. J., delivered the opinion of the court.

The first count in the indictment is good, for it charges a sale of liquor without authority of law, and that is an offense under the general law. *Norton* v. *State*, 65 Miss., 297.

The second count, tested by the law in force prior to the

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code of 1892, is bad, for not averring that the "local option" law of 1886 had been put in force in the county. *Norton* v. *State*, *supra*.

Chapter 37 of the code of 1892, on dram-shops, except as to licenses obtained after April 2, 1892, was not in force until November 1, 1892, and has no influence on this indictment.

The demurrer was properly overruled, because it was to the indictment, and one count is good; and, for the same reason, the motion in arrest of judgment was not sustainable. But the first count is not proved, and, while the second is supported by evidence, it does not warrant conviction, because it does not sufficiently charge the offense. *Norton* v. *State*, *supra*.

Evidence of a receipt by West in Pike county of an order for liquor, which he afterwards sent and got pay for, does not show a sale in that county, and therefore does not sustain the first count of the indictment. It is probable that "to sell" was used in the second section of chapter 62 of the acts of 1890 under the mistaken notion that thereby receiving orders for liquor, to be sent into forbidden territory, was prohibited, but it is impossible for a court to ascribe such meaning to the words used, which is not sanctioned by either legal or popular usage. If the purpose was to make receiving an order for liquor an offense, different language should have been employed. It is inadmissible to give to words a meaning they do not contain in order to accomplish an object it may be supposed the law-maker had in view. To predicate a sale of simply receiving an order for an article to be thereafter delivered, would violate not only all legal views of the term, but every definition given by lexicographers, or derived from the word itself.

It is useless to notice the instructions.

Reversed and remanded.

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Brief for appellant.

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WILLIAM CRIGHTON v. HENRY DAHMER ET AL.

EQUITY JURISDICTION. *Injunction. Criminal prosecution.*

Equity has no jurisdiction to enjoin one from making affidavit charging a criminal offense. It is immaterial that the prosecution is alleged to be groundless, and that the defendant has threatened to continue to have the complainant arrested from day to day as a trespasser because of his occupancy of certain premises the possession of which the defendant claims.

FROM the chancery court of the second district of Chickasaw county.

HON. BAXTER MCFARLAND, Chancellor.

The case is stated in the opinion.

W. J. Lacey, for appellant.

As a bill to remove clouds, the bill was maintainable. 25 Mo., 153; 99 Mass., 209.

The defendant, Henry Dahmer, being left free to pursue his civil remedies, could not possibly be endangered by a retention of the injunction. It should have been retained until final hearing. High on Inj., §§ 902, 944; *Bowen* v. *Hoskins*, 45 Miss., 183; *Coleman* v. *Hudspeth*, 49 *Ib.*, 562.

The existence or non-existence of a remedy at law does not afford a test as to the right to relief in equity. 5 Wall. (U. S.), 74; *Irwin* v. *Lewis*, 50 Miss., 363.

When a court of equity has acquired jurisdiction for one purpose, it will administer full relief.

We admit that an injunction will not (except probably in rare cases) be granted to restrain criminal proceedings. Here we only ask that the appellees shall be restrained from abusing the process of law. See Hilliard on Inj., page 250, and note on page 251. *Mayor* v. *Pilkington*, 2 Atk., 302; *Morris* v. *Thomas*, 17 *Ib.*, 112.

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Opinion of the court.

Property rights are involved, and equity will confine litigants to their proper remedies in civil tribunals. Abuse of criminal process will not be tolerated. Appellant is lawfully in possession, and, pending any controversy as to his right, the defendant should not be allowed to prosecute him to bankruptcy by successive arrests. The defendant can bring forcible entry and detainer; but appellant, being in possession, has no remedy known to the law, if he is not entitled to an injunction.

Orr & Stockett, for appellees.

This is an attempt to enjoin the state. The law is well settled that the state and its criminal proceedings cannot be enjoined. To restrain one from making an affidavit charging a criminal offense, is to enjoin the state from prosecuting violators of the criminal law.

The appellant had an adequate remedy at law by appeal to the circuit court. The injunction was properly dissolved.

COOPER, J., delivered the opinion of the court.

The appellant exhibited his bill in chancery against Henry, Peter, Andrew and John Dahmer. He avers that John Dahmer is the owner of a certain farm now occupied by complainant, and, on the twenty-sixth day of November, 1891, leased the same to one Delmont for the term of three years, beginning January 1, 1892, and delivered possession thereof to Delmont, who entered and occupied and held the same until November 14, 1892, when he assigned the remainder of his term to complainant, and put him in possession of the farm. That complainant continued in the quiet and peaceable possession of said farm until the —— day of ——, 1892, when, during his temporary absence, the defendants, Andrew and Peter Dahmer, forcibly entered upon the premises, and, by violence, broke into the residence then occupied by him, in which action they were advised and directed by the defendant, Henry Dahmer; that complainant, afterwards, and

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Opinion of the court.

in the absence of said trespassing defendants, re-entered and re-occupied, and yet holds possession thereof; that the defendant, Henry Dahmer, pretending at first to act as the agent of the defendant, John Dahmer, and, afterwards, as the lessee of the premises under the said John, caused complainant to be arrested on a charge of trespass, and now threatens to continue to have him arrested from day to day as a trespasser, because of his occupancy of said premises, and his refusal to deliver possession thereof to said defendant, Henry; that his purpose in so doing is to compel complainant to surrender possession of the premises, or to expend large sums of money in defense of said criminal prosecutions; that Henry Dahmer, if he has, or believes he has, any just right to the possession of said premises, could test the same by a civil proceeding; but that, knowing that he has no such right, he uses his pretended lease from the defendant, John, as a foundation to vex, harrass and annoy and oppress complainant, by resorting to criminal prosecutions against him; that said pretended lease casts a cloud upon the title of complainant to his term in the premises, and, in equity, should be canceled and annulled.

The prayer for relief is that said lease-claim by Henry shall be canceled, and that an injunction may issue, prohibiting the said defendants, or either of them, from instituting other criminal prosecutions against complainant, or from entering upon the premises without due process of law. An injunction was granted as prayed, and the defendants moved to dissolve the same upon the face of the bill. This motion was sustained, and the injunction dissolved, from which order the complainant has been granted an appeal to this court by the chancellor, in order that the principles involved may be settled by this court.

From the statement of the cause, it is apparent that the defendants, Andrew and Peter Dahmer, have, or claim, no sort of interest in the property in controversy, and there is no averment by which it appears that the defendant, John,

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claims any present right to the possession thereof. As to these defendants, the bill is a pure and simple effort to enjoin the institution and prosecution of criminal prosecutions against complainant. The relief sought, as against the defendant, Henry, is somewhat further supported by the fact that a property right is in dispute between him and complainant, as to which a court of equity has jurisdiction to afford relief. If the complainant may not sustain his right to enjoin the defendant, Henry, from the prosecution of criminal charges against him, *a fortiori*, may he not find relief in equity by injunction against such prosecutions by the other defendants.

A somewhat extended examination of the approved text-writers and of judicial decisions has disclosed no suggestion among the writers that the jurisdiction invoked may be exercised by courts of equity, nor have we found a decided case by which it is upheld, other than two cases decided by the judges of the district courts of the United States, sitting in equity upon the circuit, in which the jurisdiction of equity to enjoin criminal prosecutions has been pressed to great, and, as we think, unwarrantable, lengths. The cases to which we refer are *Bottling Co.* v. *Welch*, 42 Fed. Rep., 561, and *Lottery Co.* v. *Fitzpatrick*, 3 Woods, 222. In the first of these cases, prosecutions under a state law against unlawful retailing were enjoined, upon the ground that the complainant was engaged in interstate commerce; and, in the other, prosecution under a statute of Louisiana, forbidding the vending of lottery-tickets on the drawing of a lottery, on the ground that the state, by contract with the complainant, had granted to it the right to do the forbidden act. In neither case was there a pending suit involving property rights, but the bill in each was exhibited for the primary and original purpose of enjoining criminal prosecutions in the state court, and necessarily involved the power and jurisdiction of a court of equity to draw to itself the investigation of the guilt or innocence of the complainant of the offense, which was or

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would be the question for investigation of the courts of the state having jurisdiction thereof.

We think no English case can be found of modern times, and no case in the United States, other than the two above noted, in which a court of equity has enjoined the prosecution of criminal proceedings. In *Mayor* v. *Pilkington*, 2 Atk., 302, the complainants had exhibited their bill in chancery to establish their sole right of fishery in the river Ouse. While the suit was pending, they caused the agent of the defendant to be indicted in the sessions at York, where there were judges, for breach of the peace in fishing in their liberty. On motion of the defendant, Lord Chancellor Hardwicke made an order restraining the plaintiff from proceeding at the sessions till the hearing of the cause. In *Kerr* v. *Corporation of Preston*, 6 Ch. Div., 467, Jessel, M. R., declared that, with the exception of *Mayor* v. *Pilkington*, there was no instance in which a court of equity had interfered in criminal cases, and that in *Saull* v. *Browne*, L. R., 10 Ch. App., 64, he had declined to follow that "doubtful decision," and, on appeal, his decision was affirmed.

Where an officer of a court, acting under its direction, tore down some houses which were the subject of litigation, one of the parties to the suit was restrained from proceeding criminally against him. *Turner* v. *Turner*, 2 Eng. Law & Eq., 130. The vice-chancellor, Lord Cranworth, declared the distinction to be an obvious one, for, while the court had no jurisdiction over an indictment in general, as over a mere civil proceeding, yet, when a court made an order in a cause over which it had jurisdiction, its execution could not be made the ground of a criminal prosecution by one of the parties, for the officer would be punished by the court if he failed to comply therewith. *Mayor* v. *Pilkington* and *Turner* v. *Turner* are the only English cases with which we are acquainted in which the prosecution of criminal proceedings has been restrained, and, in each, the relief was granted by a mere order of the court, acting upon parties to a pend-

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ing suit, in which the court was proceeding, and not by injunction under the seal of the court. In *Saull* v. *Browne*, *supra*, the court refused to make an order restraining one of the parties from, at the same time, prosecuting a criminal proceeding. As against general criminal prosecutions, relief has uniformly been refused. *Montague* v. *Dudman*, 2 Ves., Sr., 396; *Holderstaffe* v. *Saunders*, 6 Mod., 16; *Attorney-general* v. *Cleaver*, 18 Ves., 211.

The supreme court of the United States, *In re Sawyer*, 124 U. S., 200, reviewed the decisions in England and America, and declared that there was no jurisdiction in chancery to enjoin prosecutions for crime, except in cases in which the order is made to restrain a party to a suit already pending before the court, and to try the same right that is in issue there. Sawyer, who had been arrested for contempt of the injunction of a federal court, was discharged on *habeas corpus*, upon the ground of an entire want of power in the court to grant the injunction.

There are many cases to be found, proceeding upon an obvious and clear distinction, in which courts of equity have enjoined acts affecting property rights, notwithstanding the fact that such acts might also be ground for indictment. To this class are to be assigned the cases of *Emperor of Austria* v. *Day*, 3 De Gex, F. & J., 217; *Spinning Co.* v. *Riley*, L. R., 6 Eq., 551. In the latter case the chancellor said: "The truth, I apprehend, is that the court will interfere to prevent acts amounting to crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of property." To the same class belong numerous other decisions which rest upon the same principle, which is clear and easily distinguishable from that of enjoining the ordinary criminal prosecutions which affect the property rights more or less indirectly, and in which no jurisdiction can be taken in courts of equity. In the cases of *Bottling Co.* v. *Welch*, 42 Fed. Rep., 561, and *Lottery Co.* v. *Fitzpatrick*, authorities for the exercise of the jurisdiction in the one class were cited

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Syllabus.

as upholding it in the other; but it is notable that in neither case was a decision cited, either English or American, in which the precise point involved had been ruled in favor of the jurisdiction. In *Montague* v. *Dudman*, 2 Ves., Sr., 396, Lord Chancellor Hardwicke declared he was unable to discover a precedent for the exercise of the power, and said: "I will go by Littleton's rule, that it is a good argument, an action lies not, because one was never brought. I never knew a bill of this kind, and therefore will not make the precedent."

There are a few cases in which the enforcement of void municipal ordinances, the execution of which directly affected property rights, have been enjoined, and criminal prosecutions before the municipal authorities restrained. *City of Atlanta* v. *Gate City Gas-light Co.*, 71 Ga., 106; *Shinkle* v. *City of Covington*, 83 Ky., 420. But, with the exception of *Bottling Co.* v. *Welch* and *Lottery Co.* v. *Fitzpatrick*, we have found no decisions of any court that a bill in equity may be exhibited for the single purpose of enjoining criminal prosecutions, and against these decisions stand the unbroken line of decisions of all courts of authority.

Judgment affirmed.

J. W. MITCHELL *v.* MCDAVITT, JAMES & CO.

1. SALE. *Fraud. Evidence. Verdict unsupported.*

Where a claimant of personal property seized under execution, introduces in evidence a bill of sale from the debtor, executed prior to the date of the judgment, conveying the property to him in part satisfaction of a trust-deed, and the testimony of the claimant and the debtor in support of the transaction is not unreasonable or improbable, and not contradicted by any positive evidence, a judgment for plaintiff should be set aside as unsupported, although the property was found in defendant's possession, and there were circumstances that, unexplained, might have cast a suspicion on the good faith of the sale.

2. PRACTICE. *Claimant's issue. Appeal to circuit court. New affidavit.*

In such case, the fact that the claimant, through mistake, made affidavit

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Statement of the case.

in the justice court, claiming as trustee in the trust-deed, and, after appeal to the circuit court, filed an amended affidavit claiming as agent for the beneficiary, was of no importance, and should not operate to his prejudice.

FROM the circuit court of DeSoto county.

HON. EUGENE JOHNSON, Judge.

In July, 1891, McDavitt, James & Co. recovered a judgment in the justice court against the firm of Thos. Fox & Co. and Thos. Fox individually, and caused an execution thereon to be levied on three mules as the property of Thos. Fox. Thereupon, appellant, Mitchell, filed a claimant's affidavit and bond. The affidavit recited that the mules levied on were not the property of Thos. Fox, but belonged to the claimant, as trustee in a trust-deed executed by Thos. Fox to secure an indebtedness to H. L. Fox. Issue was joined on this claim, and the trial in the justice court resulted in a judgment for claimant, and an appeal was taken to the circuit court. Without obtaining leave of court, Mitchell filed another affidavit, in which he claimed the mules in controversy as agent for H. L. Fox. Thereupon, plaintiffs in execution moved the court to strike this affidavit from the files, because the case had been tried in the justice court on an issue made between plaintiffs and Mitchell as trustee, and not as agent, for H. L. Fox, and because H. L. Fox was not a party to that issue, and could not become such by merely presenting an affidavit, unaccompanied by a bond. This motion was sustained, and the second affidavit stricken from the files, and the parties proceeded to trial upon the issue as previously made up.

The plaintiffs introduced in evidence their judgment, and showed that the execution was levied upon the mules while in the possession of the defendant, Thos. Fox, and on this testimony rested.

The claimant offered in evidence a trust-deed executed in April, 1891, by Thos. Fox, by which he conveyed to Mitchell, as trustee, certain land and personal property to secure an

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indebtedness of about $2,200 to H. L. Fox. The personal property embraced in the trust-deed consisted of about thirty-seven head of cattle and twenty-one mules and horses, and certain farming implements, and the trust-deed recited a previous lien on all the property in favor of Mrs. R. C. Miller for $4,000. The mules and cattle were not specifically described, the conveyance being merely of "thirty-seven head of cattle" and "twenty-one head of mules and horses." The note secured by the trust-deed was also offered in evidence, and it showed various credits "by cotton," "by cattle" and "by mules." The claimant contended that these had been delivered by Thos. Fox to him, to be applied in part payment of the note, and that the mules in controversy had been thus delivered.

The plaintiff in execution moved the court to exclude the trust-deed and note, because of the insufficiency of the description of the personal property sought to be conveyed, and because the claimant, under his affidavit as *trustee*, was seeking to litigate in the capacity of *agent* for H. L. Fox. The court excluded the trust-deed from evidence, but refused to exclude the note. The claimant then offered in evidence a bill of sale for five mules from Thos. Fox to himself, dated April 23, 1891; and this, as the testimony showed, embraced the three mules in controversy. Plaintiffs in execution also moved to exclude this bill of sale, because it tended to show title in Mitchell as agent instead of trustee for H. L. Fox. The court overruled this motion, and admitted the bill of sale in evidence.

Mitchell supported his claim by the testimony of himself and of Thos. Fox, which was to the effect that, shortly after the execution of the note and trust-deed, Thos. Fox sent to Mitchell five mules to be sold and credited on the note; that H. L. Fox consented to take them at an agreed price, which was credited on the note, and the mules were placed in a livery-stable to be sold. They were kept there about ten days, and then returned to the farm of Thos. Fox for past-

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urage, Thos. Fox giving Mitchell a receipt for them, reciting that he held them subject to Mitchell's order. While thus in the possession of Thos. Fox, they were seized under the execution issued on the judgment of appellees, McDavitt, James & Co. Mitchell testified that when the levy was made, he notified the officer that the three mules in controversy belonged to H. L. Fox. The testimony of Mitchell was, in the main, corroborated by that of Thos. Fox, and there was no direct evidence introduced by plaintiffs in execution to rebut their testimony as to the facts connected with the sale. These witnesses were cross-examined at great length, and certain facts and circumstances were developed which, it is contended by counsel for the appellees, show the transaction between Thos. Fox and H. L. Fox to be fraudulent. Those mostly relied on are that Thos. Fox, at the time the trust-deed was executed, was much embarrassed financially; that all the property embraced in the trust-deed was subject to the prior trust-deed to Mrs. Miller, and that the mules claimed to have been turned over to Mitchell for H. L. Fox were taken from the farm of Thos. Fox in the spring of the year, when they were most needed, and this was shortly after the execution of the trust-deed, and nearly a year before the debt secured by it would mature; that H. L. Fox was a brother of Thos. Fox, and Mitchell was his partner in business; that when the mules were thus delivered to be credited on the unmatured debt to H. L. Fox, Thos. Fox was being pressed by other creditors whose debts were due; that Thos. Fox was unable, as a witness, to give a description of the mules which had been turned over to Mitchell at various times to be sold and credited on his indebtedness; and, finally, that Mitchell had first filed an affidavit, in which he claimed the mules, not as agent, but as trustee, for H. L. Fox, and had afterwards written to the attorneys of the plaintiffs stating that he was acting only as trustee.

For the plaintiffs the court instructed the jury that it should find for the plaintiffs, unless it was shown that the

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Brief for appellees.

mules were sold to Mitchell in good faith before the levy of the execution, and that the jury was not bound to take the uncontradicted testimony of the witnesses as true if the facts and circumstances in evidence satisfied the jury that the sale from Fox to Mitchell was fraudulent. The verdict of the jury was in favor of plaintiffs. Judgment was entered accordingly, and, after motion for new trial overruled, the claimant appeals.

R. L. Dabney and *Calvin Perkins*, for appellant.

It was error to strike from the files the amended affidavit. The property was in *custodia legis*, and a claim could be interposed at any time. *Dreyfus* v. *Meyer*, 69 Miss., 282. The claimant was not estopped by the character of title asserted in his first affidavit.

Whether the trust-deed was sufficient in its description of the property or not, it tended to prove the good faith of the sale to the claimant, and it was error to exclude it.

There was nothing to cast suspicion upon the testimony of the claimant or his witness, Fox. They were corroborated by the documentary evidence. The verdict was contrary to the evidence.

A. S. Buchanan, for appellees.

1. The second affidavit was not an amendment of the first. It was, in effect, the propounding of a new claim in the circuit court. In the second affidavit Mitchell did not claim as trustee, as he had done in the justice court, but claimed as agent. Besides, he suffered no wrong in the striking out of the second affidavit, because the court permitted him to show his rights as agent.

2. There was no error in excluding the trust-deed. The description of the property was clearly insufficient. 63 Miss., 91; 60 *Ib.*, 385; 58 *Ib.*, 36; 57 *Ib.*, 89.

3. It was proper to instruct the jury that, if it believed from the facts and circumstances in evidence that the sale

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was fraudulent, it could find for the plaintiffs, notwithstanding the testimony of the witnesses. This is correct as an abstract principle of law, and it was applicable to the facts of this case.

4. The verdict was not contrary to the evidence. A review of the testimony will show that the jury was fully warranted in finding that the transaction was fraudulent. There was a conflict between the testimony of the witnesses and the facts and circumstances proven, and the jury found for the plaintiffs, and every presumption is to be indulged in favor of the verdict. *Harris* v. *Halliday*, 4 How., 338; *Gay* v. *Lemle*, 32 Miss., 309; *Garland* v. *Stewart*, 31 *Ib.*, 314; *Peck* v. *Thompson*, 23 *Ib.*, 367; *Watson* v. *Dickens*, 12 Smed. & M., 608; *Woods* v. *Gibbs*, 35 *Ib.*, 559. Where a witness is contradicted by the facts and circumstances, the jury must judge as to the credibility of the witness, and a new trial will not be granted. *Stovall* v. *Bank*, 8 Smed. & M., 305.

CAMPBELL, C. J., delivered the opinion of the court.

This record does not disclose any just ground for the verdict, which should have been set aside. There is nothing unreasonable or improbable in the testimony of the witnesses, and it discloses a transaction which divested the judgment-debtor of any interest in the property before the right of the judgment creditors attached.

The fact that Mitchell, the trustee, committed the blunder of making claim as such, and afterwards made affidavit of ownership by H. L. Fox, and testified to that on the trial, amounted to nothing, and yet that was made much of, and probably was very influential in producing the result which we think is unwarrantable. Let another trial be had.

Reversed and remanded.

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Statement of the case.

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A. G. B. MARTIN ET AL. v. P. A. TILLMAN ET AL.

1. FRAUDULENT CONVEYANCE. *Good between parties. Statute of frauds.*

Where a debtor, as the principal actor in a scheme to hinder and delay creditors, procures his land to be fraudulently sold under execution, thereby vesting title in his wife, under the statute of frauds, neither he nor his heirs or representatives can question her title thus acquired.

2. ASSUMPSIT. *Purchase-money of land. Liability therefor.*

Where, after the death of his wife, a husband sells land of which she died seized, her heirs joining in the conveyance, with the agreement that they are to receive the purchase-money, which, however, he appropriates, he is answerable to them for the same, regardless of any express promise to pay.

3. SAME. *Tenant by curtesy. Rents. Money had and received.*

In such case, although the husband was then (1876) entitled to possession of the land as tenant by the curtesy, it is error to deduct from the amount due the heirs any thing on account of rents, they having signed the deed upon the promise of their father to pay them the amount received as purchase-money.

4. SAME. *Accounting. Money had and received.*

It is likewise error, in such case, to deduct from the amount of purchase-money received for the heirs the value of part of the land embraced in the deed made by them, which part had been previously conveyed away by their father and mother, and as to which it is claimed the heirs had no title. They are entitled to the amount received for them, without regard to the title to such portion of the land.

FROM the chancery court of Copiah county.

HON. H. C. CONN, Chancellor.

B. F. Martin, with his wife, E. J. Martin, resided in Copiah county, Mississippi. Prior to 1866, he was the owner of a tract of land in Sunflower county. He became financially involved, and Wesson & Drane recovered a judgment against him, which was transferred to one Barry. On January 8, 1866, the land in Sunflower county was sold under this as-

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Statement of the case.

signed judgment, E. J. Martin becoming the purchaser and receiving a deed, which was placed on record. On February 18, 1876, E. J. Martin died intestate, leaving her husband surviving, also certain children, parties to this suit. After the death of his wife, it seems that B. F. Martin made several efforts to sell the Sunflower land, and finally did sell it March 4, 1890, to J. M. Goff for $4,400. Goff being unwilling to accept the deed from B. F. Martin alone, a quitclaim deed was obtained from appellees, the children and heirs of Mrs. Martin. The purchase-money was received by B. F. Martin, and there is evidence going to show that he agreed to pay it over to the children of E. J. Martin as an inducement for the execution of the quitclaim deed. On June 21, 1891, B. F. Martin died, leaving a will, which was executed February 19, 1891. In this will he appointed appellants, A. G. B. Martin and R. N. A. Martin, his sons, executors. He left no debts, unless, by reason of the facts above stated, he was indebted to his children. By his will he directed, first, the payment of all his debts, and he gave specific legacies to all his children, among whom were appellees, Mrs. Tillman, Mrs. Redus and Mrs. Mullins. He gave the *residuum* of his estate to the executors.

After the death of B. F. Martin, the appellees, Mrs. Tillman, Mrs. Redus and Mrs. Mullins, for the first time, made demand on the executors for their respective portions of the purchase-money of the Sunflower land received by B. F. Martin. Payment was refused, and they instituted actions at law against the executors for said amounts. Thereupon, the executors filed the bill in this case against said parties to prevent a multiplicity of suits, and obtained an injunction against the prosecution of the actions at law. The defendants moved to dissolve the injunction, and, the motion being overruled, they answered, making their answer a cross-bill, seeking to recover of the estate the respective amounts claimed by them on account of the purchase-money of said land, which, it was alleged, their father had received and ap-

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Statement of the case.

propriated. In answer to the cross-bill, the executors set up that in 1866, when the Sunflower county land was sold, B. F. Martin was insolvent, and that, with a view to hinder and delay creditors, he and his wife, E. J. Martin, conceived a scheme by which, in fraud of creditors, the land was to be transferred to the wife; that B. F. Martin furnished Barry with money sufficient to pay the Wesson & Drane judgment, and that Barry paid the same, taking a pretended assignment of the satisfied judgment under which the land was sold, Mrs. Martin becoming the purchaser. They averred that Mrs. Martin paid nothing, and that she participated in the scheme to defraud creditors. It seems that in 1873, B. F. Martin and wife, through their attorney in fact, conveyed a portion of the Sunflower land to other parties. Testimony was taken at considerable length, and a decree was rendered in the court below in favor of the appellees; but, by the decree, there was deducted from the amount of the purchase-money of the land received for them the sum of $844, the value of that portion of the land which had been sold by B. F. Martin and wife through their attorney in fact, and there was also deducted the further sum of $250 on account of the rent of the remainder of the land from the time of the sale to Goff until the death of B. F. Martin, he being entitled to possession as tenant by the curtesy. As this court finds from the record that the title to the land was vested in E. J. Martin under the fraudulent scheme in which the said B. F. Martin was the principal actor, and that neither he nor his representatives can be heard to assail the title of his wife thus acquired, it is unnecessary to set out the evidence.

The defendants prosecuted a cross-appeal from so much of the decree as deducted from the amount due them the sum of $844, the value of that portion of the land sold in 1873, and $250, the agreed rent of the land sold to Goff from the date of the conveyance to him until the death of B. F. Martin.

A number of points were raised and discussed that are not

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Brief for appellants.

passed upon. This statement, together with the facts set out in the opinion, will indicate the questions decided by the court.

R. N. Miller and *George S. Dodds*, for appellants.

As the judgment under which the land was sold had been paid, the sale was void, and Mrs. Martin acquired no title. Freeman on Judgments, §§ 466, 480; Rorer on Judicial Sales, §§ 720, 722, 728; 1 Hill (S. C.), 415; 37 Mo., 568; 17 Ind., 36; 19 *Ib.*, 432; 103 *Ib.*, 1; 110 *Ib.*, 211; 53 Am. R., 474; 19 Am. Dec., 411; 20 *Ib.*, 337; 27 *Ib.*, 578; 56 *Ib.*, 236; 3 Dana, 96; 21 Ala., 56; 20 N. Y., 395; 74 *Ib.*, 228; 10 S. E. Rep., 93. See, especially, *Shaw* v. *Clark*, 6 Vt., 507.

The statute of frauds, § 4226, code 1892, has no application, because, in the first place, the judgment of Wesson & Drane was not a fraudulent one. It was valid. The statute, by the use of the word "execution," means a fraudulent execution—one condemned by the statute. See 1 Smith's Leading Cases, 82 *et seq.;* Herman on Executions, § 274.

In this case there was no fraudulent execution and no fraudulent judgment, but an execution utterly void because the judgment had been paid. Besides, appellants are not insisting upon or attempting to enforce the judgment or execution.

It is not true that B. F. Martin and his representatives are estopped because he stood by and saw the land sold under the satisfied judgment. Estoppels at execution sales, by conduct or *in pais*, can only be invoked by *bona fide* purchasers. Rorer on Judicial Sales, § 443; Herman on Estoppel, § 422; 12 Am. Dec., 225. Mrs. Martin was not a purchaser for value, but had full notice.

Council cites *Claughton* v. *Claughton*, *ante*, 384, and insists that the case stands as though B. F. Martin had made a fraudulent deed to E. J. Martin, but that authority does not apply. B. F. Martin made no fraudulent grant, and there is a distinction as wide as the poles between estoppels by grant and estoppels *in pais* by conduct. In a case of a fraudulent

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Brief for appellees.

grant, the grantor is estopped, as against the grantee, on grounds of public policy, but B. F. Martin made no deed. If he is estopped, it is by his conduct, and estoppels by conduct can only be invoked by those who are innocent, and have been misled. Rorer on Judicial Sales, §§ 443, 728; Herman on Estoppel, ch. 15; 2 Smith's Leading Cases, 642 *et seq.*; 49 Miss., 576; 50 *Ib.*, 429; 55 *Ib.*, 261, 255, 671; 57 *Ib.*, 638; 61 *Ib.*, 299; 66 *Ib.*, 258. B. F. Martin could never have been estopped by his conduct in favor of Mrs. Martin. She knew that the judgment was satisfied with Martin's money before the pretended sale.

We deny that Martin made appellees any promise to give them the money received from Goff; but, if he did, it was upon a wholly different consideration from that set out in their deed, and the promise was not in writing, and there was no consideration for it. Walker (Miss.), 115; Reed on Statute of Frauds, §§ 683, 1071; 4 Mass., 347; 7 *Ib.*, 449, 483; 3 Pick., 83; 3 Am. Dec., 304; 5 *Ib.*, 62; 20 *Ib.*, 399; 8 Am. St. R., 304; 11 *Ib.*, 244.

The true ground upon which to place this case, in our opinion, is that Mrs. Martin never had a shadow of a claim to these lands, and that the efforts of appellees, her heirs, is simply to consummate an executory fraudulent contract. In addition to the above authorities, we refer to 4 Pick., 314; 11 Wheat., 258; 4 Pet., 484; 15 Wend., 412; 1 Fairfield (Me.), 71. For a collection of all the cases, see *Nellis* v. *Clark*, 20 Wend., 24, and 8 Am. & Eng. Enc. L., 771, note 4.

J. S. Sexton, for appellees.

I am not able to see how opposite counsel can avoid the force of the decision in *Claughton* v. *Claughton*, *ante*, 384, which seems to me to settle the principles of this case. We insist, in the first place, that the money of B. F. Martin was not used in the purchase of the Wesson & Drane judgment. But, if mistaken in this, yet, if, by a fraudulent contrivance, B. F. Martin procured his land to be sold, and thereby fixed

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Brief for appellees.

title in his wife, he and his heirs and representatives are forever estopped to deny her title. No one except *creditors* could assail it.

Counsel undertake to draw a distinction between B. F. Martin's attitude towards this property, which he induced the sheriff to sell, and what would have been his attitude in reference thereto if he had made the sale himself. But there is no authority for this. By § 4226, code 1892, gifts, grants and conveyances of land, as well as judgments and executions, had or obtained with the intent to hinder, delay and defraud creditors, are declared void as to creditors. There is no difference between a fraudulent grant and a fraudulent sale of property under execution. On this point, see Bump on Fraudulent Conveyances, 254, 256; 1 Smith's Leading Cases, 45; 57 Am. Dec., 668; 24 Miss., 144; 34 *Ib.*, 385; 43 *Ib.*, 641; 49 *Ib.*, 269; 50 *Ib.*, 380; 55 *Ib.*, 204; 68 *Ib.*, 323. This is not at all in conflict with the authorities cited by opposite counsel on this subject. By reference to these authorities, it will be seen that they refer to cases in which there was an effort to assert title by estoppel *in pais*, where the party sought to be estopped had simply stood silently by, without active interference to promote the sale. Here B. F. Martin was the active agent in causing the sale, and is to be treated as if his own hand had moved the pen with which the deed was signed. He comes directly within the rule laid down in Greenhood on Public Policy, page 57.

The evidence is abundant that appellees executed the deed upon the express promise that the money received for this land should be paid to them; and, furthermore, the will of B. F. Martin provides, first, for the payment of all his debts. As he owed no other debts, he must have had reference to this indebtedness due appellees.

There was no authority for deducting from the amount due appellees the value of that part of the land sold by the attorney in fact of Martin and wife. B. F. Martin promised that if they would yield their title and execute a quitclaim of

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all the lands, he would pay them the purchase-money received by him, and it makes no difference what was the condition of the title to that part of the land previously sold.

WOODS, J., delivered the opinion of the court.

It is undisputed that title to the Sunflower lands was vested in Mrs. E. J. Martin by virtue of a sale under a fraudulent execution issued at the instance of B. F. Martin as part of a deliberate scheme by him to hinder, delay and defraud his creditors. He was the author and the finisher of the fraudulent plan by which title to his lands was vested in his wife. He was the principal actor in the whole transaction, and not a mere silent looker-on while a sale was made by others under an invalid or void execution. His conduct brings him clearly within the terms of our statute of frauds, and neither he nor his heirs could be heard to assail the title of his wife or her heirs to the lands so fraudulently contrived by him to be vested in her. This view virtually disposes of the case. If the lands belonged to Mrs. Martin's heirs, as we hold they did, it needed no specific promises of B. F. Martin to pay over to them the funds arising from a sale of their lands. Without any promise, he was answerable for the money had and received in such sale.

The contention of the cross-appellees, both as to the deduction of the $844, the agreed value of the portion of the lands sold by Watts, attorney in fact, and as to the deduction of $250, rents of the lands from the date of sale to Goff until Martin's death, is well taken. These lands were all in possession of Martin as tenant by curtesy, and were all embraced in the deed to Goff and the quitclaim to Miller, and we find no intimation anywhere in the record that any distinction was made, or any agreement had, by which the purchase-money of only the lands outside of those sold by Watts, was to be accounted for by B. F. Martin. The appellees were induced to sign a quitclaim deed to all the lands therein embraced, on an express or implied undertaking of

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their father to account to them for the proceeds arising under such sale. Whether their title to the lands once conveyed away by Watts was good or bad, no way concerned the real controversy. They quitclaimed all the lands, including those once sold by Watts, for $4,400; and this was the sum they were entitled to be paid by their father, who received it. Of course, the father was entitled to the rents up to the day of his death, but the amount of such rents should not have been deducted from the $4,400.

B. F. Martin's estate was chargeable with interest at six per cent. per annum on the sum received by him, after deducting the several amounts paid Mrs. Martin's heirs immediately after the sale to Goff and Miller, from the day of his death, and no reference to rents in accounting should have been made. In all other respects, we concur with the learned court below.

Decree will be reversed in the particulars indicated, and decree entered here for appellees and cross-appellants for one-eighth each of $4,400, *less the sums of* $100 *paid by B. F. Martin to Mrs. Tillman and Mrs. Redus, and* $50 *paid Mrs. Mullins, respectively, immediately after the sale to Goff, with interest at six per cent. per annum on the amounts thus found to be due them severally from the day of B. F. Martin's death to date.*

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Statement of the case.

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J. E. BUCKLEY ET AL. v. G. G. VANDIVER.

1. ATTACHMENT. *Non-residence. Judgment for defendant. Damages.*

Where an attachment is sued out on the ground that the defendant is a non-resident, and he is such, although judgment for plaintiff is entered on the attachment for want of a plea in abatement, yet, if it is adjudicated on the debt issue that plaintiff is not entitled to recover, this is conclusive evidence that the attachment was wrongfully sued out, and defendant has a right of action for damages on the attachment bond.

2. SAME. *Damages. Attorney's fees. Defense of case.*

In such case, as the contest involves the debt, and opposing that successfully defeats the attachment, in a suit on the attachment bond, it is proper to allow as damages attorney's fees for the defense of the original case.

3. SAME. *Breach of bond. Actual damages. Attorney's fees.*

Actual damages are recoverable on an attachment bond when a breach occurs, and counsel fees are embraced. *Marqueze* v. *Sontheimer*, 59 Miss., 430.

4. SAME. *Damages. Protracted litigation. Case.*

In case of an attachment for an alleged debt of $267, where there has been three trials in the circuit court and two appeals, the defendant finally prevailing, in a suit on the bond, damages on account of attorney's fees amounting to $150, paid two attorneys for defending the attachment suit, are not excessive, there being evidence to show that the charge was reasonable and the services necessary.

FROM the circuit court of Clarke county.

HON. S. H. TERRAL, Judge.

J. S. VanDiver and his wife, G. G. VanDiver, resided in the state of Louisiana. On the seventeenth day of February, 1886, M. W. Buckley, a member of the firm of J. S. Buckley & Son, made affidavit before the clerk of the circuit court of Clarke county, that said J. S. and G. G. VanDiver were indebted to his firm in the sum of $267.27, and that the defendants were non-residents of this state. Thereupon, a writ of

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Statement of the case.

attachment was issued, which was levied upon certain real estate of the defendant, G. G. VanDiver, situated in said county. Mrs. VanDiver, being a non-resident, interposed no plea in abatement, and judgment was, thereupon, entered in favor of plaintiffs, sustaining the attachment; but the case was tried on the debt issue, resulting in a verdict of judgment in favor of plaintiffs therein. Thereupon, the defendant prosecuted an appeal to the supreme court, and secured a reversal. The cause, being remanded to the circuit court, there was a mistrial. A third trial was had on the debt issue, which resulted in a judgment in favor of the defendant. Buckley & Son prosecuted an appeal to the supreme court, but the judgment was affirmed.

On January 12, 1892, this suit was brought by Mrs. VanDiver against the principals and the surety on the attachment bond for damages. The declaration alleges that Mrs. VanDiver did not owe the debt; that it was due by J. S. VanDiver alone, and that, prior to suing out the attachment, Buckley & Son had never claimed that she was liable; that said attachment was recklessly and wantonly sued out, without probable cause, and that plaintiff was greatly damaged.

The defendants pleaded the general issue, and also a special plea, setting up that when the attachment suit was finally disposed of in favor of the defendant therein, no writ of inquiry was asked in order that damages might be assessed for the wrongful suing out of the attachment; and, by reason of this, it was claimed that plaintiff could not maintain this suit for damages. The defendants also pleaded that the question of damages for the wrongful suing out of said attachment was inquired into on the trial of the previous suit, and that the judgment therein was *res judicata*, but there was no evidence to support this plea. A demurrer was sustained to the second plea, and, thereupon, by consent, the cause was tried by the court without a jury. The above facts were shown, and judgment was rendered in favor of plaintiff for $360 damages, from which this appeal is prosecuted. In award-

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Brief for appellants.

ing damages, the court allowed $150 on account of attorneys' fees paid by Mrs. VanDiver in defense of the attachment suit. This amount was paid to two attorneys employed by her, and there was testimony tending to show that the fees were reasonable, considering the protracted litigation and the services rendered. There was, however, some conflict of testimony as to whether the amount named was reasonable compensation. There was also evidence that the plaintiffs in attachment acted upon the advice of reputable counsel in suing out the writ. There was no evidence of malice in suing out the attachment. Plaintiff, at the trial, only insisted on a recovery of actual damages, and only such damages were awarded.

Miller & Baskin, for appellants.

1. The declaration avers that the appellants maliciously sued out the writ of attachment. The verdict cannot be sustained, because there is an entire absence of evidence to show malice. Again, we submit that appellants are not liable, because the damages claimed were not proved in the attachment suit. In truth, judgment was entered in favor of appellants, sustaining the attachment. This is conclusive evidence in an action on the bond. 22 Kans., 374; 24 Wend. (N. Y.), 31.

2. Our attachment law is purely statutory, and is therefore to be strictly construed. *Yale* v. *McDaniel*, 69 Miss., 337. The defendant is only entitled to damages where the grounds alleged in the affidavit are untrue. If, as claimed, the attachment was wantonly sued out, the remedy was by an action on the case, and not on the bond. This cannot be treated as an action on the case, because the bond is declared on; and, besides, the action cannot be maintained for maliciously suing out the attachment, because the proof shows that it was not sued out maliciously, but in good faith, upon the advice of reputable counsel. On this point, see *Stewart* v. *Sonneborn*, 98 U. S., 187.

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Brief for appellants.

3. The judgment awarding $150 damages on account of attorneys' fees is excessive. In an ordinary case fees cannot be allowed for two attorneys. There is no evidence of any necessity to employ more than one firm. *Roach* v. *Brannon*, 57 Miss., 490. Counsel fees, if allowed, are only for defending the attachment issue. Such fees are not recoverable for defending the whole case.

J. L. Buckley, on the same side.

If appellee is entitled to damages for defending the debt issue, then any successful defendant may maintain such a suit. In Drake on Attachment, 176, it is said that where the suit is instituted by attachment, if the action be sustained and the attachment is defeated, the rule in Indiana is that attorney's fees for defending the attachment only can be allowed as damages. Under that rule, the appellee is not entitled to recover attorneys' fees, because the whole of her expenditure was in defending the debt issue. The appellee was unsuccessful in the attachment issue, and there was no expense incurred in defending it. Appellants did not dismiss their case as to the debt. For these reasons, this action cannot be maintained, and the judgment should be reversed.

D. W. Heidelberg, on the same side.

1. The attachment was sustained, and hence there was no breach of the bond.

2. But, if appellee was entitled to damages, she is barred because she failed to have a writ of inquiry to assess damages in the attachment case. *Res judicata* can be successfully pleaded where the matters in action were, in fact, adjudicated, and where they were involved and might have been passed upon. *Scully* v. *Lowenstein*, 56 Miss., 652.

3. Attorneys' fees are recoverable only where exemplary damages are proper. On the trial of this case, plaintiff only claimed actual damages.

Section 1462, code 1871, and § 166, code 1892, expressly

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Brief for appellee.

provide for attorney's fees as damages in an attachment suit. But there was no such provision in the code of 1880, nor is there any reported case where attorney's fees were allowed in an attachment suit while that code was in force, except where the facts justified exemplary damages. Why was the provision in the code of 1871 re-enacted in the code of 1892, if such damages were allowable under the code of 1880? In *Taylor* v. *Morton*, 61 Miss., 24, it was decided that attorney's fees and loss of time were not recoverable as damages in a replevin suit in the absence of wilful wrong or oppression. Section 2623 of the code of 1880, providing for damages in replevin suits, is broader than § 2430 of that code, allowing them in attachment cases. In *Brinker* v. *Leinkauff*, 64 Miss., 236, it was held that in an action on an indemnity bond it is improper to allow attorney's fees or loss of time in attending trial where the declaration failed to charge wilful wrong or oppression. The court there stated that the rule not to allow attorney's fees would be adhered to in all cases except in suits on injunction bonds, where they are expressly provided for by the statute.

J. R. McIntosh, for appellee.

1. If it be said that attorney's fees in a case like this were not expressly provided for in code of 1880, the answer is that neither did the code of 1857 make any such special provision. Yet, attorney's fees were never denied as an element of damages for the wrongful suing out of an attachment under that code. We submit that the allowance of attorney's fees as actual damages was proper in this case. Drake on Attachment, § 175, and authorities cited; Wade on Attachment, § 295 *et seq.*; 36 Cal., 462; 52 Ala., 254.

2. The evidence abundantly sustains the verdict as to the amount of damages. See Wade on Attachment, §§ 301–317; 59 Mo., 178; 43 Ind., 486; 37 Iowa, 428.

3. The defendant, being a non-resident, could not plead in abatement; but, when the debt was defeated, this established

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that the attachment was wrongfully sued out. Wade on Attachment, § 295; 38 Ala., 631.

4. It is immaterial that the attachment was sued out under the advice of counsel. The party is nevertheless liable for actual damages. On this point, see Wade on Attachment, §§ 310, 313, 314. Only actual damages were claimed and recovered in this suit. Unless appellee is entitled to such damages, including re-imbursement for attorney's fees, it would have been better for her, at the outset, to have permitted her property sold to satisfy the debt she did not owe.

CAMPBELL, C. J., delivered the opinion of the court.

The final adjudication in favor of the appellee is conclusive evidence that, as to her, the attachment was wrongfully sued out, and that gave her a right of action on the bond for its breach thus evidenced.

In such action, attorneys' fees for getting clear of the attachment are recoverable, and, as in this case, by reason of the non-residence of the defendant and liability to attachment for any debt, the contest involved the existence of the debt for which the attachment was sued out, and defeating recovery was defeating the attachment, it is impossible to separate the process from the action, and it was proper to allow attorneys' fees for the defense of the case.

Actual damages are recoverable on an attachment bond, when a breach occurs, and counsel fees are embraced. *Marqueze* v. *Sontheimer*, 59 Miss., 430; Kneeland on Attachment, § 456; Drake on Attachment, §§ 175, 176; Wade on Attachment, § 301; 1 Sedgwick on Damages, § 237; 2 Sutherland on Damages, 61.

The sum allowed in this case for attorneys' fees is supported by evidence.

Affirmed.

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Statement of the case.

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CAREY-HALLIDAY LUMBER COMPANY v. CAIN & HOWE.

1. PRIVATE CORPORATION. *May act without seal. Agency.*

In making a sale of its personal property, a private corporation may act without seal. Agency for the corporation in such case may be proved, and authority to act for it implied, as in case of natural persons.

2. SAME. *Bill of sale. Authority of manager. Parol evidence.*

It is not essential to the validity of a bill of sale of the personal property of a private corporation that it should be under seal. And parol evidence is admissible to show the authority of an agent or manager to execute such an instrument.

3. SALE. *Good faith. Agreement to reconvey. Rights of other creditors.*

Where a sale is made in good faith to pay or secure a creditor, the fact that there is an understanding that the property is to be reconveyed when the debt is paid will not invalidate the sale; nor will the fact that the purchaser knows there are other creditors, and is anxious to close the transaction before they can interfere. So held as against attaching creditors in this case, where an absolute bill of sale was given, which was not recorded, the purchaser, however, taking immediate possession.

FROM the circuit court of Jefferson county.

HON. W. P. CASSEDY, Judge.

On the fourteenth day of September, 1891, appellees, Cain & Howe, merchants of Natchez, Miss., sued out an attachment against the Church Hill Lumber Company, a corporation under the laws of New York, which had been conducting a saw-mill business in Jefferson county, Miss., to collect a debt of $1,523.80. This attachment was levied on certain personal property situated in Jefferson county, consisting of a saw-mill, machinery, stock, etc. This property was claimed by the Carey-Halliday Lumber Company, a corporation under the laws of the state of Illinois. Claimant's affidavit was filed, and an issue was made up to try the right of property. The Church Hill Lumber Company made no defense, and

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Statement of the case.

judgment was entered against it in favor of plaintiffs. Thereupon, the claimant's issue was tried. Among other things, it was shown by plaintiffs' testimony that the saw-mill business of the defendant, Church Hill Lumber Company, was conducted by one T. H. Woodworth as general manager, who had contracted the debt due plaintiffs; that, just before suing out the attachment, plaintiffs had received information that the Church Hill Lumber Company had sold out to the Carey-Halliday Lumber Company. One Sullivan was introduced as a witness for plaintiffs, and testified substantially as follows: "I was in the employ of the Church Hill Lumber Company. The property in controversy is the same that had been in the possession of this company, which sold out to the Carey-Halliday Lumber Company, September 7, 1891. The purchaser took immediate possession, and I continued the work for the Carey-Halliday Lumber Company. Mr. Gray, who represented the purchaser, went through the books with Mr. Woodworth, and I heard them mention, among the creditors of the Church Hill Lumber Company, the names of Cain & Howe. They went to Vicksburg to prepare the papers, because, Woodworth said, if they went to Natchez some of the creditors would jump on them before they could do this." Question by plaintiff: "Did you have a conversation with Gray, after the sale, in reference thereto?" Answer: "Yes; I did. It was a few days after the sale; the same week. He and I were going from the camp in a buggy to Church Hill, about two miles distant. During that ride, Gray, in speaking about the sale, said, 'We do not want the property; we agreed with Woodworth to deed it back as soon as we got the money.' The Church Hill Lumber Company was indebted to the Carey-Halliday Lumber Company." Question: "Did you have any talk with T. H. Woodworth, the manager of the Church Hill Lumber Company, about the sale?" (Objected to by claimant, unless Gray was present. Objection overruled.) Answer: "Mr. Woodworth talked to me about it in camp. He said the sale was not *bona fide;* it was done

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Statement of the case.

to get rid of the creditors, and, when the Carey-Halliday Lumber Company got its money, the property was to be deeded back. I asked him if he had that reserved in the bill of sale. He said no; that he was not to do that, because it would vitiate the sale. He wanted me to ask Gray about it, so that I could be a witness; and I did ask Gray about it, when we were in the buggy together, as aforesaid, and Gray admitted it."

This was substantially all the evidence introduced by plaintiffs. Thereupon, the claimant introduced Harry Gray, who testified that, in 1889, he was the agent of the Carey-Halliday Lumber Company, being its secretary and treasurer. Question: "Did you or not, acting for the Carey-Halliday Lumber Company, purchase the property in controversy in this suit? If so, state when and where it was, and all about it." (Counsel for plaintiffs objected to any oral testimony about the sale if it was in writing, and the objection was sustained.) Question by claimant: "Was it in writing?" Answer: "It was." Question: "Examine the paper handed you, and state whether or not it is the original bill of sale of the property in controversy from the Church Hill Lumber Company to the Carey-Halliday Lumber Company." Answer: "It is."

Here claimant offered to introduce a written bill of sale of the property in controversy, and certain land, to the Carey-Halliday Lumber Company, dated September 7, 1891. It recited a consideration of $1,269.50 cash, and the assumption by the purchaser of $1,269.50 due by the seller to employes. It was signed: "The Church Hill Lumber Company, T. H. Woodworth, manager." The instrument was not under seal. It was acknowledged the day of its execution, but had not been placed upon record. Counsel for claimant proposed to put the same in evidence in connection with the testimony of Gray. Plaintiffs objected, on the ground there was no corporate seal attached, and because it did not appear that the sale had been authorized by the Church Hill Lumber Company. Objection sustained, and claimant excepted.

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Brief for appellant.

Articles of incorporation of the Church Hill Lumber Company were introduced in evidence. These recited that the business of the corporation should be managed by a board of directors, or by some one appointed by the board for that purpose. Thereupon, claimant again proposed to offer the testimony of the witness, Gray, to show the sale of the property in controversy, and that claimants continued in possession thereof after September 7, 1891, and also the execution of the bill of sale. Plaintiffs' objection to this testimony was sustained, and claimants excepted. Claimant declined to offer any further testimony, and the court instructed the jury to find for plaintiffs. Verdict and judgment accordingly. Motion for new trial overruled. Claimant appeals. The opinion contains a further statement of the case.

Boyer & Butler, for appellant,

Filed a lengthy brief, as to the questions decided by the court making the following points: The contract which the court excluded from the jury contained no evidence of a want of power in the corporation to make the sale. *Prima facie* it was legal. If officers of a corporation exercise a power which presupposes a delegated authority, and corporate acts show that the corporation must have contemplated the existence of such authority, the exercise of power will be deemed rightful. *Railroad Co.* v. *Bridge Co.*, 131 U. S., 371. See also 38 N. W. Rep., 606; Green's Brice's Ultra Vires, page 40. The contracts of a corporation which, on their face, appear to be within its charter are not to be regarded as unauthorized. There is no presumption that the law has been violated. 2 Cowen (N. Y.), 664; 4 Hill (N. Y.), 442; 19 N. Y., 369; 17 Ga., 574; 5 B. Mon. (Ky.), 129; 14 Ind., 383; 4 Minn., 385; 46 Ala., 98; 3 Met. (Mass.), 133; 51 Fed. Rep., 1. Even where a contract is *ultra vires*, the corporation or its stockholders alone can take advantage of it. 7 N. W. Rep., 695; 54 N. Y. Sup. Ct., 235.

It was manifest error for the court to exclude evidence

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Brief for appellee.

showing the authority of Woodworth, the manager, to make the sale. It not only rejected all the evidence offered by the claimant, but actually took the case from the jury by giving an instruction to find for plaintiffs.

J. J. Whitney and *Coffey & McRee*, on same side.

Mayes & Harris, for appellee.

Sullivan's testimony showed that both parties admitted that there was no sale in fact. This was sufficient, *prima facie*, to sustain the attachment. It then devolved on claimant to show title. The pretended bill of sale which was introduced was not under seal, and it was executed by Woodworth, who was not shown to have authority to sell the corporate property. The act was void.

The charter of the defendant company, which was introduced by claimant, showed that the affairs of the corporation were to be controlled by a board of directors, or by some one appointed by such board; it does not provide for a general manager. It was incumbent on appellant, claiming through the agent, to show his authority.

The court properly excluded the bill of sale and the testimony of Gray, as there was no attempt to show authority to make the sale. Nor was there any attempt to impeach or contradict Sullivan, who testified as to the bad faith of the transaction.

It will be noted that the bill of sale purported to convey all the property of the defendant, including real estate. A seal was essential. Code 1892, § 2437.

The authorities relied on by opposite counsel relate to corporate acts and acts of agents within the apparent scope of authority. They are not applicable here, as there was no attempt to show authority on the part of Woodworth.

This case differs essentially from that of *Flash* v. *Baldwin*, 58 Miss., 593. Here there was an attempted transfer by one who had no right to make it. This was not the act of the corporation.

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Opinion of the court.

But, if it be conceded that the act was authorized, the want of good faith invalidated the transaction.

CAMPBELL, C. J., delivered the opinion of the court.

The court erred in excluding the bill of sale and the proposed testimony of the witness, Gray, and in the general instruction for the plaintiffs. It is a mistake to suppose that a corporation may not speak or act except by a seal, or that agency for it may not be proved as for a natural person, or that authority conferred by a corporation may not be implied as in other cases.

Woodworth was the manager of the business of the corporation in this state, its sole representative here, and the person through whom the plaintiffs had become creditors of the corporation for the debt in suit; and, *prima facie*, he had authority to sell the property of the corporation to pay its debts, as he had authority to contract the debt with the plaintiffs.

If the Church Hill Lumber Company owed the appellant, and sold its property to the latter in good faith to pay this debt, there was nothing wrong in the transaction, even if there was an understanding between the agents that the property would be reconveyed when the vendee was fully paid.

The testimony of Sullivan amounts to no more than that he learned from Woodworth and Gray that the sale was to pay a debt, and that the buyer did not desire the property, and would part with it when fully paid for its purchase. It seems probable that the transaction was a legitimate one, and full inquiry should be permitted to learn its true nature. If the one owed the other, and a sale was agreed on for the purpose of paying or securing the creditor, the fact that the creditor was willing to reconvey, when paid, or knew there were other creditors, and was anxious to have the transaction for its security or payment consummated before interference by others, does not cause condemnation of the sale. The

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Statement of the case.

law requires good faith, but it does not pronounce it bad faith for one to look to his own interests, and protect them, requiring only that in doing that he must not do any thing in fraud of other creditors.

Reversed, and remanded for a new trial.

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CHRISTOPHER COLUMBUS COLE *v.* EBENEZER ZACHARY TAYLOR COON ET AL.

1. TAX-TITLE. *List of lands. Certificate. Code* 1871, § 1698.

Under § 1698, code 1871, requiring a tax-collector to file with the chancery clerk a list of lands sold for taxes, "certified under his hand to be correct," which shall be in lieu of conveyances, it is sufficient that a list be filed, subscribed by the tax-collector, though omitting to state that it is a *correct* list.

2. SAME. *Code* 1871, § 1709. *Lapse of three years. Irregularity.*

Under § 1709, code 1871, where more than three years elapsed after a sale of land for taxes, any mere irregularity, as an excessive levy, cannot be made available to defeat the tax-title. *Gibson* v. *Berry*, 66 Miss., 515; *Sigman* v. *Lundy*, *Ib.*, 522.

3. SAME. *Code* 1871, § 1709. *Invoked without being pleaded.*

The curative effect of § 1709, code 1871, as to tax-sales, is always available where the facts make the statute applicable. Unlike a mere statute of limitations, it is not required that it shall be pleaded. It may be invoked on appeal for the first time.

FROM the chancery court of Lincoln county.

HON. H. C. CONN, Chancellor.

The appellant, Cole, filed the bill in this case to confirm tax-titles to certain lands. Appellees, E. Z. T. Coon and W. C. Coon, were made defendants, as were any or all other persons claiming title to the land. The bill alleges that the land was owned by the state of Mississippi, it having acquired title through tax-sales, and that on September 25, 1883, it

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Statement of the case.

was conveyed to complainant by the auditor. The land consisted of two tracts, one of which was sold to the state for non-payment of taxes January 3, 1876, and the other March 7, 1881. The auditor executed separate deeds for the two tracts, and these were made exhibits to the bill. The defendants answered, E. Z. T. Coon disclaiming interest in the land. W. C. Coon denied that the state owned the land at the time of the conveyance to complainant, and asserted ownership in himself. He admitted that the land had been sold to the state, but set up various defects in the sales.

At the hearing, the complainant introduced the deeds from the auditor. He also introduced certified transcripts of the lists of lands sold to the state January 3, 1876, and March 7, 1881, as above. These included the land in controversy. The heading of the first-mentioned list was as follows: "A list of the lands sold to the state for the taxes due thereon for the year 1875, on the first Monday of January, 1876," etc. Then followed the description of the lands, and this was subscribed by the tax-collector. Objections as to matters of form were made by the defendant to the introduction of these lists.

The defendant, among other things, set up that the taxes on the land sold January 3, 1876, had been paid, and, also, that there was an excessive levy of taxes for that year, and that this latter was true in respect to the sale of March 7, 1881. At the hearing, defendants offered to introduce a tax-receipt showing that the taxes on the land sold January 3, 1876, were paid by him to the tax-collector January 20, 1876. He also offered to show that he applied to the chancery clerk to redeem and pay the taxes after the sale, and was informed by the clerk that the tax-collector had not filed with him the list of lands sold to the state, and that he would have to pay the taxes to the collector, which he accordingly did January 20, 1876. This evidence was objected to by complainant, on the ground that the collector had no authority to receive the taxes after the sale, and the objection was sustained. The

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Brief for appellee.

defendant also introduced certified transcripts from the minutes of the board of supervisors, with a view to show that there was an excessive levy of taxes for the years 1875 and 1880.

The court below decreed in favor of complainant as to the land sold in 1881, and denied him relief as to that sold in 1876. From this decree complainant appealed.

Section 1709 of the code of 1871 provides as follows: "No suit shall be commenced in any court of this state to invalidate any tax-titles to lands after three years from the time said land was sold for taxes." This statute is not alluded to in the pleadings.

It does not appear who was in possession of the land.

R. H. Thompson, for appellant.

The objection of defendant to the list of lands sold to the state in 1876 will not avail, because the answer admits the sale of the land to the state for taxes. But, aside from this, the objection is without force. It was not necessary that the collector should make use of the word "correct" in certifying the list. He filed a list of lands, which was authenticated by his official signature. If it was a list of the land he had sold, necessarily it was a correct list. The case of *Ferrill* v. *Dickerson*, 63 Miss., 210, has no application. In that case there was an entire absence of a certificate.

It is submitted that the levy of taxes for 1875 was not excessive. But, if it was excessive, the defendant cannot now avoid the tax-sale on that ground. Code 1871, § 1709; *Nevin* v. *Bailey*, 62 Miss., 433; *Gibson* v. *Berry*, 66 *Ib.*, 515; *Sigman* v. *Lundy*, *Ib.*, 522.

A. C. McNair, for appellee.

1. The decree appealed from is correct. If there is any error, it was committed in favor of appellant by excluding evidence of the redemption of the land from the tax-sale of 1876. This redemption was made by payment of the taxes

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Brief for appellee.

to the collector before he had filed with the chancery clerk the list of lands sold to the state. By § 1698, code 1871, the collector was required to file with the chancery clerk, by the first Monday of February, a list of lands sold to the state, and the owner was given two years from the day of sale in which to redeem. It would be startling if the right of redemption accrued only from the time the list of lands were actually filed with the clerk. The right of redemption cannot be curtailed by judicial construction. *Moody* v. *Hoskins*, 64 Miss., 468. The right to redeem through the clerk was not given until the list was filed with him, and, as there is no right without a remedy, it follows that the redemption could only be made through the collector during the time after the sale and before the filing of the list.

This was not an effort to show payment of the taxes by parol, as condemned in *Edmondson* v. *Ingram*, 68 Miss., 32. In the first place, it was a redemption, and not a payment of taxes, and, in the second place, the law providing for a certain form of tax-receipt first appeared in the code of 1880. See § 516.

2. The list of lands sold in January, 1876, was inadmissible because not properly certified. The statute required the collector to file a list "certified under his hand to be correct." Code 1871, § 1698. This is in lieu of conveyances, and the statute had to be complied with. The provision was intended as a safeguard against frauds of the collector, and to give stability to titles acquired at tax-sales. But it is sufficient to say that the statute required this form of certificate, and it is a tyrant. Here the caption does not purport to be a certificate, but was only intended as an identification of the paper. On this point see *Ferrill* v. *Dickerson*, 63 Miss., 210; *Mayson* v. *Banks*, 59 *Ib.*, 447.

3. The levy of taxes for the year 1875 was clearly excessive, and this rendered the sale void. *Peterson* v. *Kittredge*, 65 Miss., 33.

4. Section 1709, code 1871, does not aid complainant. That

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law is defensive. The authorities referred to by counsel do not sustain the position assumed. *Lewis* v. *Seibles*, 65 Miss., 251. This point was not made in the lower court, and will not be considered here.

CAMPBELL, C. J., delivered the opinion of the court.

Although not as full and formal as is desirable in such case, the list of lands sold to the state in Lincoln county, on the first Monday of January, 1876, may be regarded as certified in conformity to law, and as evidence of title in the state. It appears to have been authenticated as such list by the official signature of the tax-collector, and that meets the legal requirement.

More than three years having elapsed after the sale, which was subject to the curative operation of § 1709 of the code of 1871, then in full force, any mere irregularity in the proceedings resulting in the sale, cannot be made available to invalidate it. *Nevin* v. *Bailey*, 62 Miss., 433; *Gibson* v. *Berry*, 66 *Ib.*, 515; *Sigman* v. *Lundy*, *Ib.*, 522.

The cure wrought by time, in its silent flight, under that statute, is always available when claimed, and is declared by the court in every case in which the facts make it applicable, even if invoked in a cause for the first time here. It is not a mere statute of limitations, to be pleaded to be made available, but heals unasked.

Decree reversed, and decree here for complainant; costs in both courts to be taxed to W. C. Coon.

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Brief for appellant.

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A. E. ANDERSON, JR., v. AUGUSTUS HAWKS.

TAX-COLLECTOR. *Fees of. Delinquent taxes. Code* 1892, § 2021.

Section 2021, code 1892, authorizing tax-collectors to receive "ten per centum on all taxes collected after the fifteenth day of December by distress or otherwise," does not provide a penalty on the delinquent tax-payer, but compensation to the tax-collector for services. The words "or otherwise," following the word distress, must be considered as *ejusdem generis*. Hence the collector is not entitled to such compensation, even after December 15, where the taxes are paid or tendered before a resort by him to distress or some of the other statutory modes for enforcing payment of delinquent taxes. *Railroad Co.* v. *Love*, 69 Miss., 109.

FROM the chancery court of Sunflower county.

HON. W. R. TRIGG, Chancellor.

The bill in this case was exhibited in January, 1892, by appellee, Hawks, a citizen of Great Britain, against Anderson, sheriff and tax-collector of Sunflower county, to enjoin him from proceeding, by distress or otherwise, to enforce the payment of the taxes on certain land owned by complainant, and especially to enjoin the collection of the ten per centum commission claimed by said tax-collector because of the alleged failure by complainant to pay the taxes before the fifteenth of December. The injunction was issued, and, on final hearing, was made perpetual, and the tax-collector prosecutes this appeal. The further facts necessary for an understanding of the questions passed on by the court are stated in the opinion.

J. Holmes Baker and *C. C. Moody*, for appellant.

Appellee had no right to assume that the tax-collector would accept, as payment of taxes, a deposit in the bank at Jackson. Appellee was in no manner prejudiced because the assessment-roll was not placed in the hands of the tax-collector until November 14.

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Brief for appellant.

There was ample time for all persons to ascertain and pay the amount of their taxes before the fifteenth of December. The right of the tax-collector to the ten per centum on all taxes collected after December 15 is clear. The case of *Railroad Co.* v. *Love*, 69 Miss., 109, is not similar to this case. There the tax was paid to others, who had the same right to receive it as the tax-collector had. The same was true in *Wynne* v. *Railroad Co.*, 45 Miss., 569. In this case, no one is authorized to receive the taxes except the tax-collector.

It is evident from the language of § 2021, code 1892, that the tax-collector does not receive this per centum as compensation for services. For every act he does towards levying distress, such as advertising, selling and conveying delinquent land and personal property, he is entitled to compensation as fixed in the fee-bill. It is evident, therefore, that the ten per centum is a penalty to induce tax-payers to pay promptly, and it is given to the tax-collector as a perquisite of his office. Any other construction would necessarily postpone the collection of taxes on land, and collectors would be powerless to enforce payment.

Nugent & Mc Willie, on the same side.

The language of § 2021 of the code is too plain to admit of construction. The money would come into the collector's hands as certainly as collected. The words "or otherwise" are broad enough to cover taxes collected in any manner, and there is no reason, either from the language or policy of the statute, to narrow its application to money collected by compulsory process. Prior to the tax-sale in March, there is no way the officer can collect taxes on land other than by distress, save through voluntary payments, and to such payments alone can the words "or otherwise" attach. The date from which the right to damages begins is fixed, and the damages accrue on all delinquent taxes. While it is true, as held in *Wynne* v. *Railroad Co.*, 45 Miss., 569, that a sheriff is

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Brief for appellant.

not entitled to commissions where the defendant pays a judgment to plaintiff, it is there said that the sheriff would be entitled to his commission if the money was received by him under authority of the execution. The assessment-roll in the hands of the tax-collector is as good a warrant for collection as the execution in the hands of the sheriff.

In *Railroad Co.* v. *Love*, 69 Miss., 109, the intimation is that the collector would be entitled to his commission if the taxes had been paid to him.

The ten per centum is as much a penalty upon the delinquent as a compensation to the officer, and is imposed to hasten payment. Cooley on Taxation, 309. It is just that the officer shall have extra compensation in such cases, since he is compelled to keep open his office and keep the tax-books, after the time of payment has elapsed, solely to accommodate delinquents. In analogy with this view, the auditor is allowed, by § 3805 of the code, commission on taxes paid by non-residents.

The words "or otherwise" cannot be construed to refer only to proceedings *ejusdem generis*. There is here no other proceeding the appellant can resort to. Even the remedy by distress is ineffectual, as the appellee has no personal property.

The words "or otherwise" have been variously construed according to the manner of their employment. For cases where these words are not construed as referring to things of the same kind as those enumerated, see 31 Ch. D. (Eng.), 638; 8 *Ib.*, 148; 2 *Ib.*, 251; 4 *Ib.*, 395; 2 *Ib.*, 431; 4 Ex. D. (Eng.), 317; 44 L. R., 19; 21 Q. B. D., 246; Dwarris on Stat., 673; Suth. on Stat. Con., §§ 268–282. To deny any word or phrase its known or natural meaning in any instance, the court ought to be quite sure that it is following the legislative intention. Endlich on Int. Stat., § 34. Under a statute authorizing a corporation to take "by direct purchase or otherwise," it was held that the words "or otherwise" were broad enough to include every mode of acquiring real estate. 23 N. Y., 388. See 2 Atkins (Eng.), 601.

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Brief for appellee.

The construction contended for has been the practical construction of the section by officers of the revenue department and the public for about twelve years. It would seem that if this were erroneous, it would have brought about a different expression of the legislative intent. Long and general usage may clear away ambiguities and have a potent influence in the interpretation of statutes. *Chrisman* v. *Brookhaven*, *ante*, p. 477; *Plummer* v. *Plummer*, 37 Miss., 185; Suth. on Stat. Con., §§ 137, 308, 309; Endlich on Int. Stat., §§ 351–368; 5 Cranch, 22; 1 La. Ann., 419; 21 How., 35; 17 Mass., 122; 5 McLean, 9.

The fact that the collector is given separate compensation for each step taken in making the collection, is persuasive that the ten per centum is not compensation for services. His services are otherwise compensated.

J. L. McCaskill, for appellee.

1. It is not contended that payment into bank was a technical tender, but it was a substantial compliance with the invariable custom of appellant in receiving taxes. The money was in the bank to the credit of the collector before the fifteenth of December. In equity and fair dealing, appellant ought to be bound by this payment.

2. The ten per centum is not a penalty on the tax-payer, but is compensation to the collector for extra services in collecting by distress or otherwise. To entitle him to this compensation, he must be more than simply a receiver of taxes. It is not usual for the legislature to give penalties entirely to an officer. They are usually divided with the school or other public funds. It would have been easy for the legislature to have provided for damages on all taxes collected or *paid* after December 15, but the statute does not so read. *Railroad Co.* v. *Love*, 69 Miss., 109. I deny that it has been the custom of tax-collectors to collect this per centum. It is an exception where it is done.

The words "or otherwise" must be construed in connec-

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tion with the whole section. Following the word distress, they must be construed as referring to proceedings *ejusdem generis*. Anderson's Law Dictionary, 394.

Argued orally by *J. L. McCaskill* for appellee.

COOPER, J., delivered the opinion of the court.

On the undisputed facts disclosed by this record, it would probably be sufficient to say that the appellee should not be required to pay the additional ten per cent. on the amount of his taxes, even though the collector would ordinarily be entitled to demand and receive it. If the tax-roll had been placed in the hands of the collector at the time fixed by law, it is far more than probable that his taxes would have been paid long before the expiration of the period within which they were payable. His agent wrote to the collector early in October, inquiring what amount was due as taxes, but, the roll not then being in the hands of the collector, he was unable to give the desired information. Section 3794, code 1892, directs that a copy of the roll shall be delivered to the collector on the first day of October, but, in this instance, the roll was not delivered until November 14. Only one month and a day was given to the tax-payer in which to pay his taxes, instead of two months and a half, as contemplated by the statute. The appellee resides in England, and his remittance to his agent for the payment of his taxes was received on the fifteenth of December, and all possible effort was made by the agent to pay the taxes that day. He placed the sum in the bank at Jackson in which the collector was accustomed to make his deposits, and procured the bank to send a telegram to the collector, notifying him of that fact. The collector, however, refused to recognize the deposit as payment, and demanded ten per cent. of the amount of the taxes as damages. A month's delay on the part of the officers of the state was counted for nothing, though it probably was the direct cause of the failure of the tax-payer to pay his taxes at

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the time fixed by law, and a few hours' delinquency by the tax-payer was seized upon to subject him to an onerous charge.

But the demand of the collector finds no support in law, in any view of the question.

By § 2021, code 1892, the following fees are allowed to the collector of delinquent taxes:

"1. To tax-collector; payable by the delinquent tax-payer alone:

"(*a*) Ten per centum on all taxes collected after the fifteenth of December, by distress or otherwise.

"(*b*) For each distress and sale of personal property to collect taxes, $1.00.

"(*c*) For each delinquent poll-tax collected, $1.00.

"(*d*) For each conveyance of land sold to individuals for taxes, $1.00.

"(*e*) For advertising and selling each separately described subdivision of land sold for taxes, 25 cents.

"(*f*) And two per centum on amount necessary to redeem."

The argument of counsel is that the ten per centum referred to in paragraph (*a*) is in the nature of a penalty, imposed by law to incite the tax-payer to promptitude; or, if mistaken in this position, then they insist it is additional compensation provided for the collector, to which he is entitled on all taxes received by him after December 15.

That the ten per centum spoken of in the statute is not inflicted as a penalty, is settled by the case of *Railroad Co.* v. *Love*, 69 Miss., 109. It will be noted that the law does not impose upon the collector the duty of collecting the additional sum, and it is not suggested by counsel for appellant that he may not release or forbear its collection at his pleasure. The true construction of the law is that set forth in *Railroad Co.* v. *Love*. It gives compensation to the officer for services really performed, and when these are not performed, compensation cannot be justly claimed. *Wynne* v. *Railroad Co.*, 45 Miss., 569.

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It is no reply to this to say that the same section also gives to the collector specific fees for each service performed by him. This suggestion strengthens rather than impairs the construction of the statute we have heretofore expressed, for if all other fees provided for by the section are clearly as compensation for services, the inference is a strong one that the per centum allowed is of like character.

The language of the law is that the collector shall be entitled to receive from the delinquent tax-payer "ten per centum on all taxes collected after the fifteenth of December, by distress or otherwise." The words, "by distress or otherwise," obviously relate to the taxes on which the per centum is to be calculated, and not to the per centum only. The collector is entitled to ten per centum on such taxes as shall be collected by him after the fifteenth of December, "by distress or otherwise."

Keeping in view the fact that the allowance is made as compensation for services, and that delinquent taxes may be collected; (1) by distress of personal property (Code 1892, § 3802); (2) by sale of land (*Ib.*, §§ 3811–3815); (3) by certifying the assessment to other counties in which the delinquent may have property (*Ib.*, § 3822); (4) by suit (*Ib.*, § 3747); (5) by action on the bond required of transient traders (*Ib.*, § 3871), it is not difficult to discover the meaning of the words *or otherwise*, which, upon familiar rules, are to be construed as applying to matters *ejusdem generis* as the preceding particular words, a contrary intention not appearing.

The collector had performed no duty or services in the collection of the taxes of the appellee, and was not entitled to the per centum claimed.

The decree is affirmed.

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Brief for appellant.

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W. S. GIBBS *v.* JOHN McGUIRE.

1. SEALS. *Code* 1880, § 993, *abolishing. Not retroactive.*

Section 993, code 1880, abolishing all distinctions between sealed and unsealed instruments, except as to corporations, was not retroactive. It does not affect conveyances executed prior to the adoption of said code, either as to the rights conferred by them or the remedies on them.

2. SAME. *Title in ejectment. Unsealed deed. Lex rei situs.*

Accordingly, an unsealed deed, executed prior to the code of 1880, did not convey the legal title, and cannot now be relied on as evidence of title by a plaintiff in ejectment. That the deed was executed in another state, where seals were not required, makes no difference. The *lex rei situs* controls.

FROM the circuit court of Bolivar county.

HON. W. R. WILLIAMSON, Judge.

Ejectment by W. S. Gibbs against John McGuire.

The assignments of error present many and complicated questions, but the single point decided by the court is sufficiently illustrated by the facts stated in the opinion. On the trial the court, as to the issue here involved, gave a peremptory instruction for defendant, and plaintiff appeals.

Moore & Jones and *Mayes & Harris*, for appellant.

It is true that a deed must be executed according to the *lex rei situs*. It is manifest that the failure to affix the seal arose from the fact that the grantor was a citizen of Texas, where seals were not necessary, and the deed was executed before the code of 1880 was adopted; but by § 993 of that code the defect was cured. The question is merely one of remedy, and this section abolishes all distinction between sealed and unsealed instruments, both as to rights and remedies. An unsealed deed, even before the code of 1880, was not a nullity. It conveyed a perfect equitable title. *Nixon*

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Opinion of the court.

v. *Carco*, 28 Miss., 414. Besides, § 993 was intended to effectuate the intention of the grantor, which was in danger of failure because of a technical rule as to conveyancing, not applicable under the law of the domicile of the grantor. See Cooley's Con. Lim., 369–378. Appellee does not claim to be a *bona fide* purchaser of this title who will be injured by this application of the statute. The point can serve him only to defeat appellant's action by the rule that plaintiff in ejectment must recover on the strength of his own title.

Nugent & McWillie, for appellee.

In an action of ejectment, the plaintiff must show a perfect legal title in himself. The unsealed instrument, executed prior to the code of 1880, was not evidence of title. At that time real estate could only be disposed of by deed, and a seal was an essential part of a deed. See *Davis* v. *Brandon*, 1 How. (Miss.), 154; *Alexander* v. *Polk*, 39 Miss., 737.

COOPER, J., delivered the opinion of the court.

It is unnecessary to consider several important and interesting questions argued by counsel, for, whatever might be the conclusions reached upon them, the insufficiency of the plaintiff's title is so evident that but one result can be reached, which is to affirm the judgment of the court below. In the chain of title, the plaintiff produced and relied upon a conveyance of title by a writing not under seal, executed on the twentieth of January, A.D. 1880, some nine months before the code of 1880, by which seals were abolished, became operative. The instrument was executed by the maker in the state of Texas, by whose laws, it is said, seals were not required to deeds, and this fact is suggested as explanatory of the failure to seal the conveyance on which the plaintiff relies. The rule that a conveyance of land must be made according to the *lex rei situs* is recognized by counsel, who seek to avoid the consequence of the absence of the seal by the suggestion that by the code of 1880 the use of private

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seals was dispensed with, and all distinction between sealed and unsealed instruments, made by private persons, either as to rights conferred by them or the remedies on them, were abolished. Code 1880, § 993.

Counsel's position is that the instrument is not a nullity, but is effectual to convey a complete equitable title, and that all else is a mere question of remedy, and that, since, by the section of the code referred to, all distinction of remedy was abolished, the plaintiff may recover at law, as well as in equity, upon the right given by the instrument.

While the power of the legislature to have so legislated as to give effect to unsealed conveyances according to the intention of the parties is admitted, we find no evidence of any such purpose in the law. It does not declare a rule for the past, but for the future, and, having abolished the use of seals, it, at the same time, abolished those distinctions which had previously existed in reference to remedies which rested upon the existence of seals. But there is nothing to indicate that a different effect was to be given to an instrument previously executed than it had at the time of its execution. The one introduced by the plaintiff was confessedly insufficient to convey the legal title to land when it was made. *Alexander* v. *Polk*, 39 Miss., 737. And the plaintiff suing in ejectment at law must recover upon a legal title. *Thompson* v. *Wheatley*, 5 Smed. & M., 499; *Wolfe* v. *Dowell*, 13 *Ib.*, 103; *Torrance* v. *Betsy*, 30 Miss., 129; *Heard* v. *Baird*, 40 *Ib.*, 793; *Lockhart* v. *Camfield*, 48 *Ib.*, 470.

Judgment affirmed.

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Statement of the case.

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Wallace McPherson v. Acme Lumber Company.

1. Conditional Sale. *Title reserved. Assignment of debt. Replevin by seller.*

Where the seller of personal property has reserved title to secure the purchase-money, evidenced by notes, he may, after default, bring replevin for the property, notwithstanding he has indorsed the notes, and suits are pending thereon against the vendee by the indorsees. The seller can enforce the security, but he will hold the property or proceeds in trust for the owners of the notes. The court has ample power to protect the defendant from being compelled to pay twice.

2. Replevin. *Forthcoming bond. Destruction of property.*

It is no defense in replevin that the property in controversy, without fault of defendant, who had given bond therefor, was burned while in his possession. *George* v. *Hewlett, ante,* 1.

From the circuit court of Lauderdale county.

Hon. S. H. Terral, Judge.

Replevin by Wallace McPherson against the Acme Lumber Company.

The case was, by consent, tried before the court without a jury, upon an agreed statement of facts, the substantial parts of which are as follows: In January, 1891, McPherson sold to the Acme Lumber Company certain personal property, being the machinery and outfit for a dry-kiln. The written contract between the parties provided that, upon receipt of the bill of lading for the property purchased, the lumber company should pay a certain sum in cash, and execute its notes for $400 each, payable in three and five months respectively. The contract stipulated that the title of the kiln should remain in the seller until payment in full should be made. After the execution of the contract, the parties thereto agreed upon a change as to the size of the kiln and the price to be paid, and, in accordance with this agreement, the said lumber company paid a certain sum in cash, and ex-

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Brief for appellant.

ecuted its four notes for the balance of the purchase-price. These notes were indorsed and assigned by Wallace McPherson to other parties, and, as they fell due, the lumber company having failed to pay any of them, the holders instituted suits upon them. Subsequently, the lumber company executed a mortgage to other creditors, covering all its property, including the property in controversy, and the assignee of the above-mentioned notes united with other creditors in a bill to cancel the mortgage and subject the property embraced in it to the payment of their debts. After the institution of this suit, McPherson, being indorser on one of the assigned notes, paid to the holder thereof the sum of $115; and, while the above-mentioned suits at law and suit in equity were pending, he instituted this replevin suit to recover the property, the title to which he had reserved at the time of the sale. The defendant gave bond, and retained the property, and while it was in his possession, and before a trial of the replevin suit, it was burned. It does not appear how the property came to be burned, though it seems that counsel and the court assume that it was destroyed without fault on the part of the defendant.

It was agreed, further, that the questions to be decided, and upon which the rights of the parties should depend, are (1) whether the plaintiff can maintain replevin, while, at the same time, the assignees of the notes are suing thereon, and (2) whether the burning of the property, after the bond had been executed by the defendant, is a defense.

During the trial, the plaintiff offered to deliver to the defendant all the said notes if the defendant would pay the value of the property in controversy; but this proposition was not accepted. The court rendered judgment in favor of the defendant, and plaintiff appeals.

Hamm, Witherspoon & Witherspoon, for appellant.

1. It is no defense that the property was burned while in defendant's possession. By executing the replevin bond, de-

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Brief for appellant.

fendant prevented plaintiff from getting possession of his property. But for this, the property would probably not have been destroyed, or else plaintiff could have prevented loss by insuring. It is just and right that the bond should be liable. This question has been put at rest by the decision of this court in *Hewlett* v. *George*, *ante*, 1.

2. The pendency of the suits on the notes cannot defeat the action of replevin. It was clearly the intention of the parties to the contract that defendant should be liable on the notes, and that the property should also stand as a security. Plaintiff was not willing to part with his property upon the security of the notes alone. There is no effort to recover the full price of the property, and, at the same time, recover the property itself. The object of all the suits is the same, *i. e.*, the collection of the debt due by the defendant. The resort to the security is consistent with this purpose. The vendor of land may, at the same time, enforce his lien in the chancery court and sue at law on the purchase note. So a mechanic may enforce his lien, and, at the same time, sue in assumpsit. The vendor who reserves title can recover even against an innocent purchaser from the vendee. 53 Miss., 609. It is only when the contract is rescinded that the tender of the money is necessary. The bringing of an action of replevin is merely enforcing the contract. *Duke* v. *Shackleford*, 56 Miss., 552; *Dederick* v. *Wolfe*, 68 Miss., 500; *Tufts* v. *Stone*, *ante*, p. 54. The fact that the notes have been assigned cannot prevent McPherson from maintaining the action of replevin. He has no interest in the collection of the debts. He is no more than a naked trustee. He is interested to the extent that he is liable as the indorser on the notes. Even since the institution of the action of assumpsit, he has paid $115 to one of the plaintiffs because of his indorsement. Hence, the lumber company owes that much directly to McPherson. The mistake of counsel for appellee is in considering the purpose of the action of replevin to be the determination of who is the owner of the property in dis-

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Brief for appellee.

pute. It is to determine who is now entitled to possession. We do not contend that McPherson should recover the property and hold it as absolute owner. Defendant could, at any time, terminate plaintiff's right of possession by paying the balance of the purchase-money. See *Tufts* v. *D'Arcambal*, 85 Mich., 185 s.c. 24 Am. St. Rep., 79. If there were any merit in this contention, the offer of plaintiff, upon the trial, to return the notes is a complete answer to it.

Miller & Baskin, for appellee.

We submit that appellant cannot reclaim the property sold, and, at the same time, recover the purchase-money. He has neither the right to immediate possession as owner nor any special property as bailee. Hence, he cannot maintain replevin. *Buck* v. *Payne*, 52 Miss., 271. The record nowhere discloses that defendant is insolvent. The property ought not to be recovered and the notes also collected. Appellant transferred the notes, and, by so doing, stripped himself of all right to the property, or the proceeds thereof. He was paid therefor by the assignee of the notes. If it be true that the property is a mere security for the notes, and may be resorted to as such, the transfer of the notes carried this security as an incident.

Plaintiff, by joining in the chancery suit, is estopped to proceed with this action, under the well-known doctrine of election. Upon maturity of the note, plaintiff had the choice of remedies, either to bring suit on the notes or to bring replevin for the property. He cannot do both. The following cases seem to us conclusive against the appellee. 87 N. Y., 166; 46 *Ib.*, 354; 18 *Ib.*, 557; 48 Conn., 267; 6 Am. & Eng. Enc. L., 250; 3 *Ib.*, 434; *Bailey* v. *Hervey*, 135 Mass., 172; 126 *Ib.*, 482.

Dederick v. *Wolfe*, 68 Miss., 500, relied on by appellant, was decided with reference to a special stipulation in the contract by which the purchaser obligated himself to pay "absolutely and at all events." Besides, that was not a case where the notes had been assigned.

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Opinion of the court.

As to the liability of the sureties on the replevin bond after the destruction of the property, see *Atkinson* v. *Foxworth*, 53 Miss., 741.

Woods, J., delivered the opinion of the court.

1. The law is well settled in this state, that the vendor of personal property, under a conditional sale, whereby title is reserved in himself until notes evidencing the debt for the purchase-price have been paid, may sue in assumpsit on the notes, and, at the same time, institute replevin for the recovery of the property, title to which was retained, for the purpose of availing of this security for the payment of his debt. It is supposed, however, that, as McPherson, the appellant, has assigned and transferred all the unpaid notes to different parties, and that, as these third parties are suing in assumpsit on their respective notes, and McPherson is prosecuting this action of replevin, the rule of law stated above to be well settled in this state is inoperative in the case at bar. This supposition is unreal.

Waiving the rights of McPherson as an indorser on all the notes sued on, and his rights, because of his payment, since maturity, of $115 on one of the notes, there still can be no doubt as to his right to subject the property, title to which was retained in himself as security for the debt, to the payment of the unpaid notes. He alone can enforce this security given for the purchase-price. The title was retained by him for the purpose of securing the notes given for the purchase-price of the kiln, and the title is in him; but he is only the trustee for the holders of the notes, with the rights and powers of such trustee. On a recovery in this action, McPherson, as a mere trustee, must apply the money realized from the security to the payment of the debt secured by it; and, if the appellees, at any time, should entertain any fears as to the misapplication of the money recovered in this suit by the appellant, whereby it might be sought to enforce payment of the notes sued on in the other actions, after judgments obtained on them,

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by a simple appeal to the proper court, all fears may be allayed by McPherson's being required to pay the money to those entitled to it, or by an order directing the money to be paid into court. If the appellee shall pay the notes to the holders, or pay the money that may be realized in this suit, designed to enforce a security given for payment of the purchase-price of the kiln, to the trustee, McPherson, it may readily protect itself from a double payment. There does not seem to us to be the slightest danger of the appellee having to pay the same debt twice. If the notes shall be paid even now, that payment may be successfully interposed as a perfect defense to the further prosecution of this action of replevin.

2. That the burning of the property after it had been replevied by the defendant, affords no defense in this action is decisively settled, in the opinion of this court, in the case of *George* v. *Hewlett*, *ante*, 1, decided at the October term, 1890. The views of the learned counsel for appellee, on this point, were repudiated in a carefully prepared and exhaustive examination of this very question, and the case of *Whitfield* v. *Whitfield*, 44 Miss., which announced non-liability for the loss or destruction of property wrongfully withheld from the true owner, was, in express terms, overruled.

Reversed and remanded.

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Brief for appellant.

J. & B. HART v. H. M. TAYLOR.

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76 406

1. BOND; PAYABLE TO BEARER. *Negotiability. How sued on.*

A written obligation reciting that the maker is bound to "Millsaps College, or bearer," in a certain sum, to be paid to said college or its assigns if it shall be permanently located at Jackson, and in consideration of the benefit therefrom, is not governed by § 1124, code 1880, but is negotiable as at common law, and, being payable to bearer, any holder thereof for value, whether by written assignment or not, may sue thereon in his own name. *Craig* v. *Vicksburg*, 31 Miss., 216.

2. CONTRACT; PAYABLE ON CONDITION. *Recital. Failure of consideration. Estoppel.*

Although a simple contract to pay money on condition is not negotiable, and does not import a consideration, a contract to pay a certain sum to the bearer on a sole condition, which itself implies a consideration, is negotiable, and the maker, when sued by one who has acquired it, for value and in good faith, cannot show a different consideration or failure of consideration.

FROM the circuit court of the first district of Hinds county.
HON. J. B. CHRISMAN, Judge.
The opinion states the case.

Calhoon & Green, for appellant.

1. The bond is to Millsaps College, or bearer, to pay the ollege or its assigns. The college does not sue, and is not he bearer. It never assigned, and the bearer had no cause f action. Only the college or the bearer could sue, and the earer could not sue until there was neglect or refusal to pay he college or its assigns. This is too plain for construction. his, as we submit, alone settles the case, and necessitates eversal.

2. But the bond, being conditioned on the performance of ervices, was never under the operation of the law merchant, nd is not in the contemplation of its rule that failure of con- ideration could not be set up against negotiable paper.

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Brief for appellee.

Shackleford v. *Franks*, 25 Miss., 49. The contract being with bearer to pay the college, or the assigns of the college, contingent on location of the college, leaves open all defenses between the obligors and the college. The bearer could not set up any higher right to defeat equities than the college or its assigns could, for the payment was to be to them, and not the bearer.

Nugent & Mc Willie, for appellee.

The appellants would put upon the word "assigns" a limitation not warranted by any thing in the instrument sued on or the accepted meaning of the word. Assigns are "persons to whom property has been transferred." In some cases the transfer must be made by deed; in others, any writing signed or words spoken by the assignor, showing the intention to transfer, is sufficient; in others, mere indorsement is effectual; and again, as in obligations payable to bearer, mere delivery invests the assignee with all the rights of the original holder or owner.

The obligation in suit is one payable to bearer, nor is it any the less such because of the use of the alternative expression, "Millsaps College, or bearer." The word "assigns," subsequently employed, is referable to any one who, receiving it from the college, might become the bearer. Every subsequent bearer was the assignee of the college within the meaning of the word as employed in the particular writing, and also as defined and used by law writers. Burrill on Assignments (2d ed.), 1, note 1; Daniel on Neg. Inst., § 729, p. 585; Rapalje & L. Law Dic., vol. 1, 87, 89.

The appellants are also mistaken in their view of the case, when they seek to apply the rule that the obligation, being for services, is not under the operation of the law merchant, and that, the liability being contingent upon the location of the college, the defendants could avail of all defenses based on failure of consideration, etc. The obligation sought to be enforced, so far as concerns the defendants, is one for the

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payment of money, and not, as in *Shakleford* v. *Franks*, for the performance of services. The college being located by the other party to the contract, the defendants owed a specific sum of money that was not payable in services, or any thing except legal tender currency.

Again, the location of the college was not the burden assumed by defendants, and the alleged failure of consideration involved other matters entirely disconnected with such location. The pleas, referred to as setting up an alleged failure of consideration, did not really aver any failure of consideration. The consideration is expressed in the instrument sued on, and shown to be the permanent location of the college in Jackson or its vicinity, and the allegations of the declaration on that head are not controverted.

COOPER, J., delivered the opinion of the court.

This action was brought by the appellee in his own name, upon the following writing:

THE STATE OF MISSISSIPPI, *Hinds County.* } *Know all men by these presents:* That we are held and firmly bound unto Millsaps College, or bearer, in the sum of five hundred dollars, to be paid at the following dates: $250 July 1, 1891; $125 October 1, 1891; $125 January 1, 1892; to said Millsaps College, or its assigns, for the payment whereof I bind myself, my heirs and assigns, by these presents. Witness my signature, this tenth day of March, A.D. 1891.

"The condition of this obligation is as follows: By an act of the legislature of the state of Mississippi, entitled 'An act to incorporate Millsaps College, and for other purposes,' approved February 21, 1890, the trustees of said college were authorized to select a place at which to locate the said college, and to receive donations from any city, town or individual. Now, if said trustees select Jackson, Hinds county, or its immediate vicinity, to be the permanent site of the college, I agree, in consideration thereof, and of the benefits,

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direct and indirect, to me therefrom, that this obligation shall be in full force and effect; otherwise to be void.

"J. & B. HART."

The plaintiff avers that the defendants delivered said writing to the trustees of Millsaps College, who, afterwards, selected the immediate vicinity of the city of Jackson as the permanent site of Millsaps College, and thereafter transferred and delivered said writing to plaintiff for a valuable consideration. The defendants, *inter alia*, pleaded that the writing sued on had never been assigned in writing to the plaintiffs, which plea was, upon motion of the plaintiff, taken from the files, because presenting a feigned and immaterial issue.

The defendants' fifth plea is as follows: "For a fifth plea to the declaration herein, the defendants, by their attorneys, say that the said instrument of writing sued on, is payable, by its terms, to Millsaps College or its assignee, and was obtained by misrepresentation, in this, that said Millsaps College assured said defendants that they were to be one of forty persons in business in Jackson, Miss., who would each subscribe and sign instruments in writing similar to that sued on, and especially that the firm of Dreyfus & Ascher had agreed to subscribe and sign, and would do so, for $500; and said Millsaps College was duly informed by said defendants, that they would, and did, sign said instrument sued on only because of the said assurances, and based on their truth; and that they did not propose to subscribe for more than their competitors in business; and said defendants say they signed said instrument relying on the truth of said assurances, and would not otherwise have signed it; and they say that, in fact, the said firms would not and did not, and said Dreyfus & Ascher would not, did not and had not agreed to sign such similar instruments as aforesaid.

All of which the said defendants are ready to verify; wherefore, they say said instrument sued on is without consideration and void, and they pray judgment accordingly," etc.

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Opinion of the court.

To this plea the plaintiff demurred, and his demurrer was sustained. The cause was then heard upon other issues, and resulted in a judgment for the plaintiff, from which the defendants prosecute this appeal.

Two questions are presented: (1) Can the suit be maintained by the plaintiff in his own name, or should the action have been in the name of Millsaps College, for the use of the plaintiff? (2) If the suit is properly brought, can the defendants rely upon the matter set up by their fifth plea in defense of the action?

The first question is answered in the affirmative, upon the authority of *Craig* v. *City of Vicksburg*, 31 Miss., 216. In that case the city of Vicksburg had issued certain bonds, payable to bearer, and, being sued by Craig, the bearer of one of the bonds, pleaded: (1) That the bond sued on had been delivered to the Commercial Bank of Millington, and that the defendant, before notice of any transfer or assignment thereof, had well and truly paid the amount thereof to said bank; and (2) that the said bond was fraudulently, and without consideration, obtained from the defendant. Demurrers were interposed and sustained to both pleas, and, upon appeal, the cause was elaborately argued and considered by the court. It was held (1) that, by the terms of the contract, the bonds were payable to whomsoever should become the holders thereof for value and in good faith; (2) that, being payable to bearer, they were negotiable at common law, and were not controlled by our statute declaring that "all bonds, obligations, bills single, promissory notes and all other writings for the payment of money or any other thing, shall and may be assigned by indorsement, whether the same be made payable to the order or assigns of the obligee or payee or not; and the assignee or indorsee shall and may sue in his own name, and maintain any action which the obligee or payee might or could have sued or maintained thereon previous to assignment; and in all actions commenced and sued upon any such assigned bond, obligation, bill

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Opinion of the court.

single, promissory note or other writing as aforesaid, the defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts and set-offs had or possessed against the same previous to notice of assignment," etc. Code 1880, § 1124.

In considering the question whether the plaintiff might maintain the action in his own name, the court said: "We consider it well established that the holder of a note payable to bearer, derives his title to the note from the very terms of the contract, apart from the statute in relation to the assignment of such instruments, and without any necessity of an assignment from a previous holder. It is an express contract, which the maker has issued to the world, that whoever should become the *bona fide* holder of the instrument should be entitled to receive the money therein agreed to be paid. When it comes to the hands of such a holder, the contract is complete, and surely the maker should be bound by his own agreement. It is not founded on a violation of any principle of public policy, or of any rule of positive law, and is not against good morals."

This reasoning applies with equal force to the instrument now under consideration, and supports the right of the plaintiff to maintain the present action in his own name.

The court, in *Craig* v. *Vicksburg*, then proceeded to show that the bonds were negotiable at common law, notwithstanding they were under seal, and, having reached that conclusion, declared that their consideration could not be impeached after they had passed into the hands of a *bona fide* holder.

The argument in the present case is that the instrument sued on is not negotiable under the law merchant, because the money is not agreed to be paid absolutely and unconditionally, but only upon condition that Millsaps College should be located in the city of Jackson or its immediate vicinity, and that, not being protected from assailment as a negotiable paper, it is competent to show a want or failure of consideration. If the writing contained a mere promise by the de-

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fendants to pay to the college or bearer a certain sum of money on condition, and the condition did not necssarily imply a consideration, there would be much force in the objection made, for a mere promise is not a cause of action.

It is unnecessary to recite the consideration of paper negotiable by the law merchant, for, not only will a consideration be presumed, but the presumption is conclusive in favor of a *bona fide* holder. But, as to simple contracts, the plaintiff must show the obligation of the promise of the defendant by proving the consideration upon which it rests. If the instrument here sued on was but a simple promise to pay money on condition, it would not be negotiable under the law merchant, because of the condition; and, not being so negotiable, no consideration for the promise would be presumed, and it would, therefore, devolve upon the plaintiff to show and prove the consideration of the promise. But the defendants have not only, by the form of their contract, agreed to pay the sum of money therein named to the college or bearer, but have stated therein the consideration upon which that promise rests; and the question now is, whether, as against the *bona fide* holder of their obligation, they may now show that their promise rested upon other considerations not disclosed by the instrument, and that such other considerations have failed, and thus defeat the plaintiff's right of recovery. This question must be answered in the negative.

The defendants have, by their contract, invited all persons to deal with reference to their obligation by distinctly promising to pay to any one who should acquire the instrument the sum of money therein named, provided only the college should be located at or near the city of Jackson, and have stated the consideration upon which their promise rests. The plaintiff, having acted upon the faith of that representation and given value for the contract, should not now be answered by the defendant that a secret and other consideration was promised to them, and that the promise has not been kept. They are precluded by the terms of their con-

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Statement of the case.

tract, which professes to state the terms upon which they agreed to be bound, not only to the college, but to any person who should become the owner and holder of their obligation. The right of the plaintiff is not a derivative one, coming from the college by assignment, but is original, and rests upon the direct contract and promise of the defendants with and to the plaintiff or *bearer*.

Affirmed.

C. B. ALEXANDER *v.* J. C. LLOYD ET AL.

1. GARNISHMENT. *Service. Judgment by default. Code* 1892, §§ 2134, 3417.

Section 2134, code 1892, requires writs of garnishment to be served as a summons. Under § 3417, where the service is within five days before the return-day, the garnishee is not required to answer until the next term. In such case, judgment by default cannot be taken against him before the next term, and the fact that five days have elapsed after service, and before entry of the judgment, does not change this.

2. SAME. *Personal service. Scire facias. Code* 1892, § 2134.

The last clause of § 2134, which provides that if a garnishee be not personally served, and make default, judgment *nisi* shall be rendered against him, and a *scire facias* awarded, returnable to the next term, unless the court be satisfied that he can be personally served at once, "in which case it may be returnable instanter," applies only to the service of the *scire facias*, and does not obviate the necessity of serving the original writ five days before the return-term.

FROM the circuit court of Holmes county.

HON. C. H. CAMPBELL, Judge.

Appellant, Alexander, plaintiff in a judgment against the Equitable Fire Insurance Company, of Meridian, Mississippi, caused a writ of garnishment thereon to issue against J. C. Lloyd and others, the appellees herein, returnable before the circuit court of Holmes county on the fourth Monday of

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Brief for appellees.

November, 1892. The writ was executed personally on the garnishees, but the service was not had until two days before the return-day. The garnishees did not appear at the return-term, and on the third day thereof judgment by default was entered against them for the full amount of plaintiff's judgment. On a subsequent day of the term, said garnishees moved the court to set aside the judgment against them, because the writ of garnishment had not been served on them five days before the return-day. This motion was sustained, and the judgment was set aside, and plaintiff appeals.

Hooker & Wilson, for appellant.

While it is true that a writ of garnishment, as to the garnishees, is original process, it is not required to be served five days before court. A fair construction of § 2134, code 1892, is that the garnishment shall be served in the same manner that a summons is required to be executed. But the latter part of the section shows that all the time the garnishee can require is five days after personal service before judgment, whether the service be two days before court or on the first day of the term. If he does not answer within five days after service, plaintiff is entitled to judgment.

The garnishees were in court, both by service of process and by appearance, and the plaintiff was entitled to judgment.

Cochran & Bozeman, for appellees.

We submit that a writ of garnishment must be executed in all respects as a summons. Code 1892, § 2134. It must be made returnable to a term of the court. §§ 2130, 2131. The garnishee must answer on the first day of the return-term. § 2140. As a writ of garnishment is original process, and controlled by the law applicable to a summons, where the service is within five days before the return-day, it is effectual only to require appearance at the term next after that to which it is returnable. § 3417. Counsel for appel-

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lant admit that the garnishee must have five days' personal service, but deny that it must be five days before the return-day. Such a construction would be contrary to the obvious meaning of all the code provisions above cited.

The latter part of § 2134 has no application to the original writ of garnishment.

The filing of the motion to set aside the judgment was not such an appearance of the garnishee as validated the judgment already rendered.

COOPER, J., delivered the opinion of the court.

The service of the writ of garnishment was not made five days before the return-day, and, for that reason, could not support a judgment at the return-term. Section 2134, code 1892, provides that writs of garnishment "shall be served as a summons is required by law to be executed." Section 3417 provides that summons "shall be executed five days before the return-day thereof; and if executed within five days before the return-day, it shall be good to require the appearance of the party at the term next after that to which it is returnable." Section 3427 declares in what ways the service shall be made. The purpose of § 2134 is to place writs of garnishment under all the rules applicable to other original process.

Where there has not been personal service upon the garnishee, no final judgment can be rendered against him, but a judgment *nisi* must be taken, with *scire facias* returnable to the next term, "unless the court be satisfied that the garnishee can be personally served at once, in which case it may be returnable instanter." Code 1892, § 2134. It is the *scire facias*, and not the original writ, to which this clause refers.

Judgment affirmed.

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Statement of the case.

ILLINOIS CENTRAL RAILROAD COMPANY v. BRYANT & SHACKELFORD.

1. GARNISHMENT. *Assignment of debt. Notice. Former recovery.*

Where a railroad company, after receiving notice that an employe in this state has assigned his wages, is summoned as garnishee in a suit against such laborer in another state, and, through neglect of the notice, answers admitting the indebtedness, and judgment is rendered against it, the same will be no defense to an action subsequently brought by the assignee of the debt.

2. SAME. *Assignment. Notice to agent. Scope of agency.*

A railroad company will be bound by a notice of the assignment of wages by an employe served upon a depot-agent where the latter has been accustomed for many years to receive such notices for the company, and, under orders from his superiors, communicate them to the superintendent.

FROM the circuit court of the second district of Yalobusha county.

HON. EUGENE JOHNSON, Judge.

One Cross, to whom the Illinois Central Railroad Company owed $61 as wages, assigned his account therefor to the appellees, Bryant & Shackelford, and the latter gave notice of the assignment to the depot-agent of the company at Water Valley. Two days afterwards Cross was attached in the State of Tennessee by sundry creditors, and writs of garnishment were served on the Illinois Central Railroad Company in that state, and it answered, admitting the indebtedness. Judgments were rendered against it for the amount admitted to be due, and these judgments were paid.

Subsequently, Bryant & Shackelford brought this action before a justice of the peace against the said railroad company to recover the amount of the assigned account, and the company relies for its defense upon the judgments rendered against it as garnishee in the attachment suits in Tennessee.

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Brief for appellant.

No question was raised on the trial as to the validity of the assignment to plaintiffs, but it was contended that the depot-agent was not authorized to receive for the company notice of the assignment, and, therefore, that the defendant rightfully admitted, as garnishee, an indebtedness to Cross, and should be protected in its payment of the Tennessee judgments.

The depot-agent was examined as a witness for the defendant, and testified that it had been his custom for ten years to receive notices of the assignment, by employes, of their wages, and to communicate such notices to the division superintendent, and the latter would notify the paymaster, who made monthly trips for the purpose of paying the wages of employes. He further testified that it was his duty, under orders received from the company, to forward to the superintendent all such notices served upon him. He further stated that all papers and notices intended to be served on the railroad company at Water Valley were served on him, and that the company had always recognized and acted upon such notices. The paymaster was likewise examined as a witness, and his testimony corroborated that of the depot-agent, but he testified that in this particular instance the notice was not communicated by the superintendent to him until after the company had been garnished in Tennessee, and the money paid into court. The court gave a peremptory instruction in favor of the plaintiffs. Judgment accordingly, and defendant appeals.

R. H. Golladay, for appellant.

1. Notice of assignment is not like service of process, and is not embraced in the statute authorizing service of process on an agent. Notice, to be binding, must be given to an agent acting within the scope of his agency, and the notice must be in reference to the very business. 14 Am. & Eng. R. R. Cas., 565; 1 Rorer on Railroads, 669; 1 Am. Rep., 164; 36 Am. Dec., 188; Angell & Ames on Corp., § 305; *Goodloe* v.

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odley, 13 Smed. & M., 233. The paymaster, not the depot-gent, was the proper person to receive the notice. Notice o a local agent in Mississippi was not notice to the principal, aving agents doing its business in Tennessee. 1 Am. Rep., 64. The depot-agent and superintendent were but the in-ruments of the assignee to convey the notice to the pay-aster.

2. The courts of Tennessee had jurisdiction, and its judg-ents cannot be impeached collaterally. 10 Wall., 317; 11 *b.*, 581; Drake on Attachment, §§ 88, 89; Freeman on udgments, § 135; 138 U. S., 452. Jurisdiction being con-eded, judgments of sister states must be respected. 17 Vall., 521; 116 U. S., 3. When the *res* is within a state, it subject to disposition according to its laws. This is the ase in foreign attachments. 129 U. S., 365; 93 U. S., 664; reeman on Judgments, § 573. In Tennessee, the attaching reditor is preferred to the assignee, though the debtor was otified before answer by the garnishee. 1 Sneed, 330; 5 *Ib.*, 76; 6 Cold., 470. This is not the case in Mississippi, but he Tennessee courts had jurisdiction in this proceeding, and s judgments bind our tribunals.

Mayes & Harris, on the same side.

R. F. Kimmons, for appellees.

The railroad company was bound by the notice served on he depot-agent. It had always recognized and acted on uch notices. Indeed, the depot-agent's own testimony shows hat it was a part of his duty to receive and forward such otices. The company made no effort to protect itself when arnished in Tennessee, but answered and paid the money at s peril.

WOODS, J., delivered the opinion of the court.

The decisive question in the case is, was Mauldin, the agent f the appellant at Water Valley, authorized to receive the otice of the assignment of the claim sued on from Cross to

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appellees? From Mauldin's own evidence it is clear that, under orders from his superiors, he had, for ten years prior to the assignment and notice to him in this case, uniformly received all notices of such assignments, and wired the fact to the railway superintendent for his information and action. This was his duty, under orders from his superiors, and this he performed in the present case. It was the province of the superintendent to notify the paymaster, but in the case at bar the paymaster was not notified for two days after the assignment, and after he had answered, for his company, as garnishee in the Tennessee suits, acknowledging present indebtedness to Cross, the assignor. But this answer of the paymaster in the Tennessee suits was made two days after the notice of the assignment had been given Mauldin, the agent at Water Valley.

This brief statement can surely leave no room for disputation as to Mauldin's authority to receive the notice of the assignment, or as to the liability of the company to Cross' assignees, the appellees in the case at bar.

This view disposes of the whole case. There is no question as to the force and effect of the Tennessee judgments involved. The appellees are not assailing those judgments. It is the appellant seeking to shelter itself from liability to these appellees by showing it has paid the debt assigned, and notice of which was given in time to appellant, because of judgments rendered against it in attachment and garnishment proceedings had in the courts of a sister state. Those judgments are unassailable, but they were the product of the inexcusable negligence of the railway company's officials in answering and acknowledging an indebtedness, in the Tennessee litigation, when, in fact, as the company knew, [if its officials had paid proper heed to the notice of Cross' assignment to appellees of the claim now sued on] it had no funds of Cross' in its hands, and was not indebted to him at all at the time of making its answer as garnishee.

The agency of Mauldin, his authority to receive the notice

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given him of the assignment by Cross to Bryant & Shakelford, is perfectly shown by Mauldin's unchallenged evidence, and the right to a recovery naturally follows.

Affirmed.

GREENVILLE COMPRESS & WAREHOUSE COMPANY v. PLANTERS' COMPRESS & WAREHOUSE COMPANY.

1. PRIVATE CORPORATION. *Power of directors. Consolidation.*

In the absence of authority conferred by their charters, an agreement between the directors of corporations to consolidate and merge the two into a new corporation is *ultra vires.*

2. SAME. *Ultra vires agreement. Part performance. Remedy.*

Although such invalid agreement has been partly performed, no action will lie on the agreement itself, nor can it be specifically enforced, but, to the extent that one of the corporations has received a benefit from its partial execution, the other, by proper proceedings, may recover of it.

3. SAME. *Invalid agreement. Part performance. Relief. Case.*

An agreement was made between the directors of two compress companies to merge both into a new corporation. Pending this, a joint committee took control and managed both properties, dividing the profits. The stockholders of one company refused to ratify this, and it withdrew from the arrangement, and resumed control of its property. Thereupon, the other company filed a bill to enjoin interference with the committee's control, and the injunction was issued, to continue, however, only to the end of the cotton season. The members of the committee were not made parties. The defendant, by cross-bill, prayed for an accounting. On final hearing, complainant meantime having, through the committee and independently of the suit, obtained the desired relief, the bill was dismissed. *Held*, error. The suit should have been retained, not to enforce the invalid agreement, but that an account might be taken as to any benefit received by either party from its partial execution.

FROM the chancery court of Washington county.
HON. W. R. TRIGG, Chancellor.

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Statement of the case.

Prior to 1891, the Greenville Compress & Warehouse Company and the Planters' Compress & Warehouse Company, corporations having charters under the laws of this state, owned and operated, each on its own account, a cotton compress and warehouse in the city of Greenville. In the spring of 1891 they conceived the idea of merging the two corporations into one, and a joint committee was appointed by the directors to devise a plan for consolidation. The plan agreed upon was that a new corporation should be chartered, to be known as the Greenville Cotton Press Association, and into this both corporations were to be merged, the property of the first-named company to be taken at a valuation of $100,000, and that of the latter at $90,000. This plan was reported to the officers of both corporations by their respective committees, and was approved by the directors of each; but this action of the directors was agreed to be submitted for ratification to the stockholders of each company, at a meeting to be held on the twentieth of August, 1891. At that time the stockholders of each corporation met, and the action of the directors, in agreeing to the terms of consolidation, was approved, but no notice of the meeting had been given to the stockholders of the appellant company, and many were not represented. Acting under the authority thus thought to have been properly conferred, the directors of the two corporations met, and passed a resolution directing that both compresses and warehouses should be put into the hands of a joint committee, named by them at the time, and consisting mainly of the directors of the two corporations. This committee was authorized to take such steps as it saw proper to accomplish the consolidation, and meantime to manage the property and affairs of both corporations, dividing the profits in the proportion above stated.

The committee accordingly took possession, and, inasmuch as it was found that one compress was sufficient to do the work of both, as a matter of economy, the committee operated one of the compresses and warehouses—that of the

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Statement of the case.

Greenville Compress & Warehouse Company—and leased the other to third parties. The committee continued this joint management until early in November, and realized a large amount of net earnings, which were divided between the two corporations, as agreed, each accepting the division and apportionment. The result of this course was, that the business and patronage were diverted from the Planters' Compress & Warehouse Company to that of the Greenville Compress & Warehouse Company, operated by the committee. Meantime, it was ascertained that the meeting of the stockholders of the Greenville Compress & Warehouse Company, at which the action of the directors was approved, had been called without any previous notice to to the stockholders. Accordingly, early in November, pursuant to a call for a second meeting of stockholders, and after due notice to them, the stockholders of said company met and refused to ratify the action of the directors, and voted against the consolidation. Thereupon, the directors of said company passed a resolution reciting that, as its stockholders had refused to ratify the plan for a consolidation, and, as the Planters' Compress & Warehouse Company had been closed down for the season, it was equitable and just that the latter company should have a share of the profits of compressing during the current cotton season, and an offer was made to pay to said company two-fifths of the net earnings of the season. This offer was communicated to the Planters' Compress & Warehouse Company, but was not accepted. Thereupon, the Greenville Compress & Warehouse Company, on November 10, 1891, resumed possession and control of its property, and begun to operate its compress and warehouse on its own account, ignoring entirely the joint committee. This continued until November 21, when the Planters' Compress & Warehouse Company filed this bill against the Greenville Compress & Warehouse Company and the members of its board of directors, to enjoin further interference with the management and control of the joint

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committee until the close of the current cotton season, or until the plan for consolidation could be carried out by the formation of a new corporation, and the merging therein of both companies. The bill also prayed an account of moneys received by the defendant from the tenth of November, the time when it resumed control, until the filing of the bill. An injunction was issued as prayed for, restraining the defendants from any interference with the joint committee, as then constituted and as might thereafter be constituted, until the closing of the cotton season, and until the consolidation of the two corporations could be effected. Under the protection of this injunction, the joint committee again took possession of all the property of the Greenville Compress & Warehouse Company, and controlled and operated it during the fall and winter.

The defendant answered, alleging the invalidity of the action of the directors of the two companies, and that the attempted effort to consolidate the two companies had been properly repudiated by the stockholders of the defendant. It is unnecessary to state the many other matters relied on by complainant and defendant, and set out in the pleadings. The charters of the two companies were introduced in evidence, and showed that neither conferred the power to make such consolidation. The answer was made a cross-bill, and an account asked to be taken of the moneys up to that time paid, or that might thereafter be paid, by the joint committee to the complainant, as dividends or otherwise, and that the amount so ascertained be decreed to be paid to the defendant.

Subsequently, in February, 1892, the injunction previously issued was modified and dissolved, so far as it sought to compel the defendant to enter into a new corporation to be formed by consolidation of the two companies. The injunction against interference with the joint committee was decreed to continue until the close of the business year, which was fixed by the court as the first day of June, 1892.

In October, 1892, the court entered a final decree, which

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Brief for appellant.

recited that the defendant was not entitled to the relief prayed for in its cross-bill, which was accordingly dismissed; and, further, that it appeared that the complainants were entitled to the relief prayed for, so far as it sought to enforce the agreement entered into between the board of directors and the two companies during the season ending June 1, 1892, and the injunction previously issued was to that extent perpetuated. The decree further recited that, as the relief for which complainant prayed, and to which it was entitled, had been already obtained, the bill was dismissed at defendant's costs. From this decree defendant appeals.

Phelps & Larkin, for appellant.

1. Neither the directors of a corporation nor the majority of its stockholders have the power to sell its entire property and stop its business, unless the business is a failing one, and then only by sale for cash, and not for stock in a new enterprise. 1 Beach on Private Corporations, §§ 229, 357, 359; Waterman on Corporations, § 125; Cook on Stock and Stockholders, §§ 667, 668.

2. A single dissenting stockholder can forbid the consolidation of the corporation. 1 Beach on Private Corporations, § 353; 2 *Ib.*, § 430; Cook on Stock and Stockholders, § 671; *Railroad Co.* v. *Harris*, 27 Miss., 517; 18 Wall., 233; 21 How., 441. The agreement for consolidation being void, appellant was justified in assuming control of its property.

3. It cannot be contended that appellant was estopped to resume possession of its press and business. The doctrine of estoppel does not apply in matters *ultra vires*. It can be invoked only in cases where the corporation has actually received property or money from another which it would be inequitable to hold. Even in such cases relief is confined strictly to executed contracts. *Thomas* v. *Railroad Co.*, 101 U. S., 71. An *ultra vires* contract cannot, by partial performance, become a foundation of a right of action. *Penn Co.* v. *Railroad Co.*, 118 U. S., 290; *Pearce* v. *Railroad Co.*, 22

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Brief for appellee.

How., 441. The underlying principle of those cases which afford relief in connection with contracts *ultra vires* is that of restitution—restoration of the *status quo*. 131 U. S., 371; 139 *Ib.*, 24; *Davis* v. *Railroad Co.*, 131 Mass., 258.

Skinner & Lewenthal, on the same side.

1. If the agreement be enforceable at all, it must be enforced according to its terms and tenor. If that cannot be done, the court will not make a new contract for the parties. *Liddell* v. *Sims*, 9 Smed. & M., 596. The contract was that the partnership should continue only until the consolidation could be effected. The court below held that the agreement to consolidate could not legally be carried out. It was error, therefore, to continue the partnership during the cotton season. The court could not make a new contract for the parties and decree its specific performance. Equity will not enforce contracts unless they are certain. *Montgomery* v. *Norris*, 1 How. (Miss.), 506; 3 Pom. Eq. Jur., 449.

2. The directors had no authority to make the agreement. It worked a radical change in the affairs of the corporation. It absolved the directors themselves from the responsibility placed on them by the stockholders; and, finally, it forces upon the stockholders directors not selected by them.

Complainants cannot claim that they acted in good faith without notice. The obstacles presented are matters of law, and not fact. Every one dealing with directors must know their authority. Wade on Notice; 24 How., 441; 4 Am. & Eng. Enc. L., 247.

Jayne & Watson, for appellee.

The doctrine of *ultra vires* cannot be invoked by the defendant. There is a difference in the application of the term in different contracts, and in its general sense, as well as in its application to municipal, as distinguished from private, corporations. It does not follow that, because the exercise of corporate power is prohibited by the common law, any corpo-

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Brief for appellee.

rate acts performed in violation of this prohibition will not be recognized by the law as corporate acts. It may even subject the parties to a penalty, yet be recognized by the courts, and given effect after it is consummated. Morawetz on Priv. Corp., § 648. Where stockholders waive this right, under a charter, and acquiesce in corporate acts done by the directors, they cannot complain. *Ib.*, § 654. Private corporations are held more strictly to their contracts than public ones. The contract in this case did not change the policy or line of business of the companies. The business continued to be the compressment and warehousing of cotton. The contract had been fully executed. Each company had turned over all its property to the committee, and had acquiesced in its management, and accepted the dividends upon a fixed basis.

The doctrine of *ultra vires* cannot be invoked for or against a corporation when it would defeat the ends of justice and work a legal wrong. 96 U. S., 258; 22 Cal., 620; 29 N. J. Eq., 542; 102 U. S., 420; 107 *Ib.*, 100; 48 Am. R., 271; 78 N. Y., 597. It is clearly shown that to apply the rule in this case would work irreparable harm to appellee. Its compress has been shut down, its force disbanded, and the season's business lost, and the patronage diverted to the other compress. It was impossible for equity to have been done, except by order of the court.

A private corporation will not be allowed to interpose the plea of *ultra vires* when its contracts have been performed by the other party, and the corporation has had the benefit of the contract and its performance. 48 N. J. Law, 530; 96 U. S., 258. See also *Prairie Lodge* v. *Smith*, 58 Miss., 301; *Gilliam* v. *Brown*, 43 *Ib.*, 641.

The performance of the contract was properly decreed. Even if originally unauthorized, it will be enforced under the special circumstances of this case. A corporation may be compelled to make compensation for the breach of an unauthorized contract, if the other contracting party had no

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notice of the illegality, or if the contract has been executed. Morawetz, § 684. Nothing in the record suggested to appellee the want of power in the directors of the appellant company to contract.

The cross-bill made no tender to appellee of its losses. It did not offer to do equity, and was properly dismissed. Pom. Eq. Jur., § 388; 64 Miss., 195; 67 *Ib.*, 136.

COOPER, J., delivered the opinion of the court.

The agreement between the directors of the respective companies was clearly beyond the corporate powers of either company to make, and it had not been fully executed when the appellant withdrew from it. There are some decisions which proceed on the apparent postulate that an *ultra vires* agreement, executed fully by one of the corporations, or so far executed that the *status quo* cannot be restored, may be made the basis of an action. But in many of these cases it will be found that the measure of recovery would be the same, whether the injury done to the plaintiff by the failure of the defendant to perform, or the benefit received by the defendant under the agreement, is taken as the standard. Cases of this sort may therefore be well assigned to that other and far more numerous class, in which the right of recovery is not rested upon the invalid agreement, but is recognized to exist notwithstanding the agreement, upon the principle that the defendant may not repudiate the contract and yet retain the benefit which has been derived under it.

The decided weight of authority in England and America is that no action lies upon the invalid contract, that no decree can be made by a court of equity for its specific performance, nor a recovery had at law for its breach; but that, by proceeding in the proper court, the plaintiff may recover to the extent of the benefit received by the defendant from the execution of the agreement by the plaintiff. *Penn Co.* v. *Railroad Co.*, 118 U. S., 290; *Davis* v. *Railroad Co.*, 131 Mass., 258; *Pearce* v. *Railroad Co.*, 21 How., 441;

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Ashbury Railroad, etc., Co. v. *Riche*, L. R., 7 H. L., 653; 9 Ex., 224; *In re Cork* v. *Foughal*, L. R., 4 Chy., 748.

The chancellor, by the very extraordinary course pursued in this case, has not only specifically executed the *ultra vires* agreement, but has done it by a peremptory injunction, by taking the property of the appellant from its possession and turning it over to persons not parties to the suit, and who were not appointed receivers of the court. At the final hearing the court found itself in the anomalous position of not being in condition to afford relief by final decree, because, pending the suit, the complainant had worked out its own redress by receiving from the "joint committee" provided for by the agreement which it relies on, its proportion of the proceeds of the enterprise. The court therefore dismissed the complainant's bill, but taxed the defendant with the costs.

It is to be regretted that an amicable settlement was not agreed on by the parties. The complainant should have promptly accepted the offer made by the defendant, to allow it two-fifths of the net proceeds of the season's work. In view of the condition in which the matter has been brought by the course pursued by the court below, it may be difficult to reach a complete settlement along strictly legal lines. The extent of the right of complainant is sufficiently indicated by what we have said. We will not now attempt to direct in what manner the account shall be taken, but will only reverse the decree, and remand the cause for further proceedings.

Reversed and remanded.

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Statement of the case.

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STATE, USE LAFAYETTE COUNTY, v. J. M. HALL.

1. EQUITY JURISDICTION. *Enforcing statutory penalties. Full relief.*

While courts of equity refuse to enforce penalties growing out of private contracts, they will, in proper cases, enforce statutory penalties, as where, having jurisdiction for one purpose, the enforcement of such penalty is necessary to full relief.

2. SAME. *Treasurer's bond. Reformation. Decree for penalty. Code* 1880, § 375.

Where the chancery court exercises its jurisdiction to reform a general bond of a defaulting county treasurer, and, according to the intent of the parties, decrees that it shall also stand as a bond for school-funds, it should then treat it just as if originally executed as a bond for school-funds, and a decree thereon against the treasurer and his sureties should include the penalty provided for by § 375, code 1880, and be for double the deficit.

FROM the chancery court of Lafayette county.

HON. B. T. KIMBROUGH, Chancellor.

The bill in this case was filed by the state in behalf of Lafayette county against J. M. Hall, former treasurer of said county, and the sureties on his bonds, executed as such for two successive terms of office. The jurisdiction of the chancery court was invoked to reform the bond, which was, in form, a general bond, so as to include the school-funds within its protection, this being the intention of the parties. The court decreed a reformation of the bonds, and an accounting, and from this decree an appeal was granted to this court to settle the principles of the cause. The decree of the chancery court was affirmed, and the cause remanded for further proceedings. The case, as reported on that appeal, contains a full statement of the facts. See *Hall* v. *Lafayette Co.*, 69 Miss., 529. On the return of the case to the chancery court, an account was taken, and the amount of the defalcation found to be $4,232.67. Thereupon, complainant demanded a

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Brief for appellant.

decree, under § 375, code 1880, for double the deficit, with interest on the whole from the date of the expiration of the last term of office of said treasurer. The court refused to enforce the penalty, but rendered a decree for the amount of the deficit, with interest. Complainant appeals. The refusal to render a decree for the prescribed penalty presents the only question involved.

Phil A. Rush, for appellant.

1. There is nothing in the contention that this is not a suit on the bond, but one based upon general principles of equity, without any decree reforming the bond. The final decree was for reformation of the bond, and the whole purpose of the suit is to recover on the bond as reformed. *Hall* v. *Lafayette Co.*, 69 Miss., 529. The penalty prescribed by § 375, code 1880, is against the treasurer and his sureties. In this it is different from § 369, which provides a forfeiture against the treasurer personally. Hence, *State* v. *Baker*, 47 Miss., 88, does not apply.

2. The rule that equity never enforces a penalty or forfeiture does not apply where a court of equity has jurisdiction for other purposes, and enforces a penalty that is necessary to full relief. Even a court of equity will not set itself above the will of the sovereign as expressed in legislation, but will enforce statutory penalties. The authorities cited by appellee do not contravene this rule. It will be found that the forfeitures which courts of equity have refused to enforce are those arising out of private contracts. See *Clark* v. *Barnard*, 108 U. S., 436.

This suit was brought since the adoption of the constitution of 1890, which, by § 161, gives the chancery court concurrent jurisdiction over suits on officers' bonds.

Edward Mayes, on the same side.

The general doctrine that equity abhors penalties does not apply where the penalty is imposed by statute. Courts of

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Brief for appellees.

equity will not impede the assertion of a legislative enactment in furtherance of public policy, nor sit in judgment on the wisdom of the legislature. I admit that penalties are not, ordinarily, collectible by decrees in equity, but a strictly legal remedy will often be worked out by equity courts where there is some other distinct equity that has given the court jurisdiction. That is the case here. *Clark* v. *Barnard*, 108 U. S., 436.

The court below proceeded upon a misapplication of a mere remark of this court in *State* v. *Baker*, 47 Miss., 88, holding that this case was within the reason of the statute, but not within its letter, since there had not been an actual manual execution of a school-fund bond. I submit that when the bond was reformed, it was given the same value and potency as if originally executed according to the intent of the parties. Otherwise, this question, which was intended to be laid at rest by this court in its former decision, is still unsettled. Unless the bond is given the force of a school-fund bond, we will have an anomalous instrument—one that, by the decree of the court, will have an effect different from that intended by any of the parties—namely, a bond reformed so as to include the school-fund, but not to include the sanctions provided by law for the protection of the fund against embezzlement. 3 Pom. Eq. Jur., §§ 1375, 1376.

H. A. Barr, for appellees.

1. It is true, the appellees have been held liable in equity, but the recovery is not on the school-bond. The court did not reform the general bond, but held the sureties liable upon principles of equity. It is not, technically, a recovery upon a bond, but a recovery according to the intent of the parties. See *Hall* v. *Lafayette County*, 69 Miss., 529. Section 375, code 1880, makes the treasurer and the sureties liable in a suit *upon his bond*. The statute is penal, and must be restricted to suits at law. It cannot apply to cases not plainly within its meaning and letter. *Johnson* v. *State*, 63 Miss., 228.

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Opinion of the court.

2. It is a universal rule that equity will not enforce a penalty or forfeiture. 2 Story, Eq., § 1319; *Livingston* v. *Tompkins*, 4 Johns. Ch., 431. The authorities concur that, even where a court of equity will not set aside a forfeiture, it will not lend its aid to enforce it. Leading Cases in Equity (White & Tudor), 2048; *Atlas* v. *Bank*, 3 Metc., 581; 34 Mich., 138; 1 Douglas, 527; 7 Paige, 351; 40 N. H., 530; 31 Conn., 468; 39 Wis., 353; 12 P. F. Smith, 28; 7 *Ib.*, 65. The question of the enforcement of a penalty by equity was not considered in *Clark* v. *Barnard*, 108 U. S., 436. Relief against a penalty is one thing and the enforcement of a penalty quite another. There is no conceivable difference between a statutory penalty and a penalty by agreement. In *Atlas* v. *Bank*, *supra*, the penalty was statutory.

WOODS, J., delivered the opinion of the court.

The effect of the former decision of this court in this case, on the earlier appeal, was to reform the bond of the treasurer and his sureties, so as to make it conform to the real purpose of the parties, and, in the further progress of the litigation, the reformed bond was to be treated as the school-fund bond of the parties. The prime object of the appeal to chancery was the reformation of the bond, and that appeal was perfectly sustained by this court in its former opinion in this case. The bond should have been regarded and treated in the court below precisely as if the treasurer and his sureties had executed it as a school-fund bond originally.

The bond having been so reformed, the chancery court should have proceeded to give all the relief to which the complainant was entitled. The learned court granted relief to the amount of the treasury deficit, with interest, but refused to enforce the statutory penalty. Whether this action of the court was founded on the view pressed upon us by the counsel for appellees, viz., the abhorrence of equity of penalties, and its general refusal to enforce them, or, as stated in the briefs of counsel for appellant, because the treasurer and

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Opinion of the court.

his sureties had never manually executed a school-fund bond, and, therefore, the case was not within the letter of § 375, code of 1880, is immaterial. In either event, the court was in error. From what has been already said, it will be manifest that the bond should have been regarded just as if originally executed by the appellees as the treasurer's school-fund bond.

Equally untenable is the position assumed by counsel for appellees, that equity will refuse its aid in the enforcement of penalties. The unsoundness of this view lies in the failure to mark the distinction between statutory penalties and penalties created by contract between private persons. The latter, courts of equity refuse to enforce, but the former, the expression of the will of the law-making power, the courts of equity will not undertake to disregard and nullify by refusing their aid in proper cases. 1 Pom. Eq. Juris., § 458; Story, Eq. Juris., § 1326; *State* v. *McBride*, 76 Ala., p. 51; *Clark* v. *Barnard*, 108 U. S., p. 436.

Having acquired jurisdiction, the court below should have given full relief by following the law, and enforcing the penalty. Legal remedies are constantly being worked out in courts of equity in causes where jurisdiction is acquired on some recognized ground of equitable interference.

The decree of the court below is reversed, and the proper decree entered here in accordance with this opinion.

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Statement of the case.

B. W. BRYANT *v.* J. C. HARRIS LUMBER COMPANY.

PRACTICE. *Justice court. Suit for material. Act* 1884, *p.* 84. *Filing account.*

Where plaintiff, suing in a justice court for materials furnished, made the affidavit required by act 1884 (Laws, p. 84), and had a writ of seizure and summons issued, it is error for the circuit court, on appeal, to dismiss the suit because the evidence of debt was not filed with the justice until two days after the issuance of the writ.

FROM the circuit court of Tunica county.

HON. R. W. WILLIAMSON, Judge.

Section 1 of an act approved March 11, 1884 (Laws, p. 84), provides as follows: "That § 1255, code 1880, be amended by adding the following at the conclusion of said section, to wit: 'And if the plaintiff shall desire to establish a lien on such personal property whilst in the hands of the first vendee, he shall, on filing his declaration or evidence of debt, make affidavit, stating that such property was sold by him for the debt, in whole or in part, sued on, or for labor done thereon, or for material furnished, as the case may be, describing in his affidavit the property, and the clerk or justice of the peace shall issue his writ of seizure and summons,'" etc.

This action was begun by appellee against appellant before a justice of the peace under the foregoing statute. The plaintiff made the requisite affidavit, describing the property and stating the amount of the indebtedness, and the writ of seizure was issued on the same day. An itemized account of the indebtedness, however, was not filed until two days afterwards. On the trial before the justice of the peace, a motion was made by the defendant to dismiss the suit because the itemized account was not filed on the day of the issuance of the writ. The motion was overruled, and judgment rendered for the plaintiff. The defendant appealed to the circuit court, and there renewed his motion, which was,

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by the circuit court, sustained, and the suit was dismissed; hence this appeal.

Lowe & Cochran, for appellant.

The question raised by the motion does not rise to the dignity of a technicality. It is a mere quibble. The origin, cause, and amount of indebtedness were fully set out in the affidavit. It is not required that pleadings in the justice court shall conform to rigid rules.

F. A. Montgomery, Jr., for appellee.

It is necessary that a copy of the account or note sued on, or the bill of particulars of the damages claimed, shall be filed with the justice before the issuance of a summons. Code 1880, § 2196; *Duncan* v. *Scott County*, 64 Miss., 38. See also *Pipes* v. *Norton*, 47 Miss., 61. The filing of the affidavit under the act of 1884 is not the commencement of the suit. Until the evidence of the debt is filed, the justice had no jurisdiction to issue the writ. The case is not like an attachment, where the declaration need not be filed with the affidavit. It is governed by the express provisions of the act of 1884.

CAMPBELL, C. J., delivered the opinion of the court.

It was erroneous to dismiss the suit because the itemized account was not filed until two days after the writ was issued.

Reversed, and remanded to be proceeded with in the circuit court without regard to this objection.

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Statement of the case.

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JOE RUSSELL v. J. L. STEVENS, TRUSTEE.

1. TRUST-DEED. *Crops. Description. General terms. Ambiguity.*

A trust-deed conveying "the entire crops of corn, cotton and other agricultural products to be raised and gathered by the grantor, his family or employes under him, during the year 1891, on any lands cultivated or controlled by the grantor in Clay county, Mississippi," is sufficiently definite in the description of the property.

2. MORTGAGE. *Validity. Crops to be grown. Potential existence.*

Crops to be grown by the grantor, or his employes, during the year, on land of which he is in possession, either as owner or by the consent of the owner, preparatory to making a crop, have such a potential existence as to be a valid subject of mortgage.

FROM the circuit court of Clay county.

HON. C. H. CAMPBELL, Judge.

This is an action of replevin begun before a justice of the peace by J. L. Stevens, trustee, in a deed of trust given by appellant, Joe Russell, in March, 1891, to secure a debt due to W. L. Childress. The trust-deed is in the usual form, and conveys "the entire crops of corn and other agricultural products to be raised and gathered by the grantor, his family or employes under him, during the year 1891, on land cultivated or controlled by him in Clay county, Mississippi." Default having been made in payment of the secured debt, the trustee demanded of the grantor possession of certain corn, cotton and other agricultural products, which, being refused, he instituted this action of replevin before a justice of the peace. Judgment was rendered in the justice court for the plaintiff, and the case was appealed to the circuit court.

On the trial there, it was shown that Russell, the grantor, at the time the trust-deed was executed, was in possession of the land on which the crops were grown. He had contracted

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Brief for appellant.

to purchase the land from one Robinson, and had executed notes for the purchase-price; but after the trust-deed in question had been executed, Russell executed new notes in place of the originals, one of which stipulated for the delivery of one bale of cotton "in part payment of the land, the same to be considered as rent of the land for the year 1891." This note, though executed after the giving of the deed of trust, was made to antedate it. This was all the evidence that throws any light on the character of Russell's possession of the land.

The defendant objected to the introduction in evidence of the trust-deed, because (1) it did not locate or identify the land upon which the crops were to be raised; (2) because of uncertainty in the description of the property; and (3) because it did not appear that the grantor had any interest in the land upon which the crops were to be grown. The court overruled the objection, and this action on the part of the court presents the only questions passed on in this court. Verdict and judgment for plaintiff, and defendant appeals.

Beall & Pope, for appellant.

At common law nothing could be mortgaged that did not at the time belong to the mortgagor. One could not incumber that which he did not have. A different rule prevails in equity. 1 Jones on Mortgages, § 149. The trust-deed recites that it conveys the crops to be raised and gathered. It does not specify the lands upon which they are to be raised, but says "on any lands cultivated or controlled by the grantor in Clay county." See *Miss. Valley Co.* v. *Railroad Co.*, 58 Miss., 846, citing *Wilson* v. *Boyce*, 92 U. S., 320. While such a trust-deed might be good in equity between the parties, it cannot avail in a court of law. Certainly a grant of all crops to be raised on any land cultivated or controlled by the grantor is as indefinite as a conveyance of "all the estate I may hereafter acquire," and such a conveyance, it is well settled, is void. It does not appear that the grantor owned

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any land, or had any interest in any land. The crops, therefore, had no potential existence.

Fox & Roane, for appellee.

1. At the time the trust-deed was executed, Russell was in possession of the land as purchaser. The subsequent change in the contract, by which he became the tenant, cannot affect the rights of appellee under the trust-deed.

2. The description of the property in the trust-deed is free from ambiguity. It could not possibly be more explicit or unequivocable.

CAMPBELL, C. J., delivered the opinion of the court.

The deed of trust was not a nullity, and was properly admitted in evidence. It is sufficiently definite in description of the property, and the evidence shows that the grantor had such relation to certain land on which he raised crops in Clay county in the year 1891 (being on them and cultivating either as owner or by consent of the owner), as to authorize a mortgage of the crops, which, in these circumstances, had such potential existence as to make them a legitimate subject of sale or mortgage by the common law. Possession of land, and preparation for making a crop on it, make the crop to be grown as much a subject for sale or mortgage as the next cast of a fisherman's net or the wool to grow on the sheep of the party.

Affirmed.

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Brief for appellant.

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E. BADLEY v. H. T. LADD.

PROCESS. *Execution. Deputy sheriff. Agent of plaintiff.*

A person is not disqualified to act as deputy sheriff in levying an execution because he is agent for plaintiff in collecting the judgment, and is to receive a commission on the collection. It is error to quash a levy because of such fact.

FROM the circuit court of the second district of Yalobusha county.

HON. EUGENE JOHNSON, Judge.

Appellant, E. Badley, having a claim against one Benson, placed it, for collection, in the hands of A. B. Fly, Jr. The latter, although a licensed attorney, was not at the time actively engaged in the practice of law, but acted as a collecting agent. He caused the claim in question to be sued on before a justice of the peace, and recovered judgment. Some two years afterwards, an execution was issued, and placed in the hands of the sheriff, who appointed Fly his special deputy to execute the writ. In this capacity, Fly levied the execution upon certain cotton, as the property of the defendant, and appellee, Ladd, interposed a claim to the cotton, and an issue was made up thereon, and tried in the justice court. On the trial, Fly, having meantime resumed the practice of law, and paid his privilege tax, appeared as counsel for the plaintiff.

The cause having been appealed to the circuit court, the claimant moved to quash the levy of the execution, because Fly, the special deputy who made the levy, was, at the time, the agent and attorney for plaintiff, and was disqualified to execute the writ. On the hearing of this motion, the facts were shown to be as above stated, and the court quashed the levy, and gave judgment for the claimant. Hence this appeal by the plaintiff.

W. S. Chapman, for appellant.

After a careful review of the authorities, I am unable to

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Opinion of the court.

find one where the principle contended for by the appellee has been carried as far as it has been in this case. In all cases where a party has been held to be disqualified to serve a writ, he has had absolute title or ownership, not a mere contingent interest or right to possible compensation. The interest of Fly, in this case, was too remote to disqualify him. He did not own the judgment, could not transfer it, or do any act to defeat the plaintiff. The plaintiff himself could not have prevented the sheriff from appointing Fly as special deputy, if he had so wished. Even if Fly were disqualified, the judgment would not be void, and could not be attacked collaterally. *McLeod* v. *Harper*, 43 Miss., 42. In making the levy, Fly was the agent of the sheriff. It is not a case where the sheriff was interested, hence, *Dyson* v. *Baker*, 54 Miss., 24, does not apply. It is not unusual to stimulate constables by a promise of extra commissions. The ruling of the court was extremely technical.

I. T. Blount, for appellee.

Fly could no more levy the execution than the plaintiff himself. That the plaintiff could not, see 43 Miss., 42; 54 Miss., 24; 1 Am. & Eng. Enc. L., 950. The fact that Fly had not paid a privilege tax as attorney cannot avail him. He cannot take advantage of his own wrong. His failure to do so cannot secure a right which, had he paid the tax, would have been denied him.

CAMPBELL, C. J., delivered the opinion of the court.

It was error to quash the levy. Fly was not disqualified to act as deputy of the sheriff because of the fact that he would be entitled to commissions on the collection. The law allows commissions to the officers for collecting money, and surely the right to commissions cannot properly be held a disqualification to act as special deputy. We know of no precedent for such a view, and will not make one.

Reversed, and remanded for a new trial.

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Statement of the case.

ELIZABETH SNEED v. MARY MOOREHEAD ET AL.

NEGLIGENCE. *Inn-keeper. Injury to guest. Contributory negligence.*

The declaration alleged that plaintiff, a guest at a watering-place, occupied a room in a cottage separate from the main hotel, the room being at the end of a gallery five feet high, unprotected by a railing; that on going to supper, it being dark, she left the door open and a light burning, to guide her on returning; that a servant of the hotel closed the door, and, by reason of this, and of the failure by defendants, the proprietors, to provide a railing and lights, plaintiff fell from the gallery and was injured. *Held*, a demurrer to the declaration was properly sustained, since the defendants were under no obligation to provide a railing, and plaintiff was negligent in going on despite the absence of the light.

FROM the circuit court of Copiah county.

HON. J. B. CHRISMAN, Judge.

Appellant, Elizabeth Sneed, sued appellees to recover damages for personal injuries. The declaration alleges that defendants were owners and proprietors of certain mineral wells, known as Brown's Wells, at which they maintained a hotel and cottages for the accommodation of guests; that plaintiff, while a guest at said resort, was placed in a room in one of the cottages, about one hundred and seventy-five feet from the main hotel, which contained the dining-room, at which all the guests took their meals; that the door of her room was about six feet from the end of the gallery of the cottage, the gallery being about five or six feet high, and unprotected by any railing or banisters; that, on the night in question, plaintiff repaired to the dining-room for supper, but, before leaving the cottage, took the precaution to open her door that the light from the lamp in the room might guide her in returning, it being very dark and raining; that, while plaintiff was at supper, a servant of defendants' engaged about the hotel, closed the door of the room, and

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Brief for appellees.

thereby shut off the light which she had provided; that, notwithstanding the night was dark, there was no light provided by defendants about said cottage; that plaintiff, while returning, exercised due care, but, by reason of the negligence of defendants in failing to surround the gallery with a railing and to provide sufficient lights about the cottage, and by reason of the closing of the door, which shut off the light plaintiff had prepared for herself, she fell from the end of the gallery to the ground, and received painful and permanent injuries, for which she claims damages.

Defendants demurred to the declaration, on the ground that it disclosed no negligence on the part of defendants, and because it showed that the injuries were caused by plaintiff's want of ordinary prudence. The demurrer was sustained, and, plaintiff having declined to amend, the suit was dismissed.

J. S. Sexton, for appellant.

In all cases where damages accrue to another by the negligence or improper conduct of a person in the exercise of his peculiar trade and business, an action is maintainable. 3 Ohio State, 172. The rule is as applicable to a hotel-keeper as to a railroad company or any other party. The owner of land is liable to one who comes there by invitation, and sustains injuries occasioned by the unsafe condition of the premises, which condition the owner negligently suffers to exist. 60 Mich., 86; 129 Mass., 367; 94 Ill., 349; 37 Am. Rep., 295; 32 *Ib.*, 284. It cannot be said that plaintiff knew of the danger, as she had a right to assume that she would find things as she had left them, and she had taken the precaution to provide a light to guide her return. She was only required to exercise ordinary care and prudence under the circumstances surrounding her. 26 Am. St. R., 165; 41 Am. R., 219.

Mayes & Harris, for appellees.

The facts stated in the declaration fail to fix upon the de-

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fendants any responsibility for the accident. An inn-keeper is bound to entertain only to the extent of his accommodation. Schouler on Bailment, 287. There is no liability on an inn keeper, *per se*, to protect the persons of his guests. He is not an insurer of their safety, but is only held for negligence. As to the responsibility of owners of premises, see Cooley on Torts, 648; Bigelow on Torts, 295. The declaration shows that plaintiff had accepted the accommodations as she found them. She was fully advised as to the situation. It is not alleged that the gallery itself was unsafe, but the injury resulted from plaintiff's walking off the end of it.

There was no duty on defendants to light the grounds. The fact that plaintiff provided a light and left her door open is immaterial. Before she was injured she found that the light was extinguished. The danger still existed, but she kept on in the dark and was injured, thus causing her own injuries.

CAMPBELL, C. J., delivered the opinion of the court.

The declaration does not show liability of the defendants for the injury suffered by the plaintiff. They were under no obligation to have railing, or other protection, around the "gallery." The possibility that some one might fall off, was not sufficient to suggest that a railing should be put there. The situation was known to the plaintiff, and the necessity for caution had presented itself to her, as shown by her putting the light so as to guide her on her return to her room. Her error, resulting in serious hurt, consisted in going on when she found the light gone. Her misfortune is deplored, but reparation cannot be made by despoiling the defendants, who were under no greater obligation to have railing around galleries than other persons who have galleries, and invite visitors to their houses.

Affirmed.

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Statement of the case.

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E. L. LINDENMAYER ET AL. v. RALPH GUNST ET AL.

1. ADVERSE POSSESSION. *Non-resident. Limitation. Code* 1880, § 2678.

A non-resident may acquire title to land by adverse possession held for him by others for ten years. Absence from the state does not prevent the running of the statute in his favor, since ejectment can be brought against the tenant. It is only where a right of action accrues *in this state*, and the person liable goes from and resides out of it, that § 2678, code 1880, applies to prevent the period of such absence from being counted.

2. STATUTE OF LIMITATIONS. *Ejectment. Demand for rent.*

The statute of limitations of six years applies to the demand for rents asserted by a plaintiff in ejectment.

FROM the circuit court of Wilkinson county.

HON. W. P. CASSEDY, Judge.

This is an action of ejectment, brought in July, 1892, by E. Lindenmayer and other plaintiffs, about twenty in number, against Gunst, to recover a large tract of land, and also rents and profits. Gunst was a mere tenant of J. U. Payne, who was admitted to defend in his stead. The land was originally owned by Ben Rodgers, through whom both parties claim, the plaintiffs claiming as remote heirs and devisees, and the defendant, Payne, under mesne conveyances, beginning with a trust-deed executed by Rodgers, and a foreclosure sale by the trustee therein. It becomes unnecessary to set out the chain of title relied on by either the plaintiffs or the defendants, since the court finds as a fact that Payne has acquired title by adverse possession. It was not controverted that Payne and his immediate vendors had been in possession for more than ten years, but it is contended, in behalf of appellants, that, inasmuch as Payne was, during the entire time, a non-resident of this state, the statute of limitations did not run in his favor.

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Brief for appellees.

Section 2678, code 1880, is as follows: "If, after any cause of action shall have accrued in this state, the person against whom it has accrued shall be absent from, and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action after his return." The case was submitted to the court to be tried without a jury, and the court was of the opinion that defendant had acquired title by adverse possession, except as against one of the plaintiffs, who did not come of age until November, 1883, and gave judgment accordingly. The plaintiff in whose favor a recovery was had, recovered one one hundred and twentieth part of the land, and a like proportion of the rents.

The court held that the six-year statute of limitations applied to the demand for rents, and, as the successful plaintiff had been of age for more than that length of time before suit was brought, he recovered rent for only six years. The plaintiffs have appealed.

A. G. Shannon, for appellants.

The statute of limitations has not run against the plaintiffs, because Payne, and all persons through whom he claims, were non-residents of this state. There is no good reason why § 2678, code 1880, shall not apply to actions for the recovery of land as well as to personal actions. In the adoption of the code of 1857, real actions were omitted from the exception for absence, and placed on the same footing with other actions. The statute has remained substantially the same since the adoption of that code. For the same reason, the claim to recover rents has never been barred.

D. C. Bramlett, for appellees.

Section 2678 has no application to a case like this. It applies only to personal actions, where, because of defendant's absence, a suit cannot be brought. The plaintiffs could have brought suit at any time against the tenant.

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Statement of the case.

CAMPBELL, C. J., delivered the opinion of the court.

The judgment is correct. Payne acquired title by adverse possession for ten years. Section 2678, code of 1880 (§ 2748, code of 1892) has no application. It applies only where a cause of action accrues *in this state*, and the person against whom it has accrued goes from and resides out of the state. A non-resident may acquire title to land by adverse possession held for him by others. An action against the tenant would give the possession to the true owner, and prevent the ripening of the possession into title.

The successful plaintiff had no right to rent for more than six years.

Affirmed.

MERIDIAN NEWS & PUBLISHING COMPANY ET AL. *v.* DIEM & WING PAPER COMPANY.

RECEIVER. *Appointment. Notice. Decree. Case.*

Execution creditors of a newspaper publishing company, having levied on its presses and outfit, filed a bill against it and certain claimants under trust-deeds who had bonded the property, alleging that defendants were conspiring to hinder and delay complainants until the debts secured should mature, and the property could be sold, and bought in by claimants; that the immediate appointment of a receiver was necessary to prevent this, and to subject the income of the property. *Held*, that the appointment of a receiver, without notice, and before process served, was erroneous, since any wrongful disposition could have been prevented by injunction; and, further, that a decree, authorizing the receiver to continue publication of the newspaper, was too broad.

FROM the chancery court of Lauderdale county.

HON. T. B. GRAHAM, Chancellor.

This is a bill filed May 13, 1892, in the chancery court of Lauderdale county by appellees, the Diem & Wing Paper Company and Louis Snider's Sons & Co., in behalf of themselves and such other creditors of the Meridian News & Pub-

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Statement of the case.

lishing Company as would join therein. The bill alleges that the complainants named, had each recovered a judgment against said publishing company in the justice court, and had caused execution to be issued and levied on the presses, machinery, type and entire outfit of said company; that there were prior unsatisfied judgments against the company aggregating about $2,000; that before the recovery of complainants' judgments, said defendant had executed a deed of trust on a part of its property to one Johnson, as trustee, to secure an indebtedness of $1,400 to the Savings Building & Loan Association, which debt would not mature until 1898; that the defendant had likewise executed a trust-deed, conveying all of its visible property to one Moody, as trustee, to secure an indebtedness of about $8,000 to Lloyd Brothers and J. C. Lloyd; that this debt would be due July 5, 1892; that when the executions on complainants' judgments were levied on the property of said defendant, the trustees in the said deeds of trust interposed claims to the property, and gave bonds for its forthcoming; that the constable making the levies demanded of the defendant corporation its books of account and choses in action, whereupon its officers professed ignorance as to the whereabouts of said books of account and choses in action, and declared their inability to produce them. The bill further alleges that the trustees are not entitled to the possession of said property before the maturity of the respective debts secured by the trust-deeds, and, until then, complainants are entitled to subject to their judgments all of said property; that the claimants' affidavits and bonds were made in fraud of the rights of complainants, and for the purpose of placing the property of said publishing company beyond the reach of judgment creditors until the maturity of the trust-deeds; that the assets of said company, apart from its choses in action, were insufficient, if sold, to pay the debts secured by said trust-deeds; that Lloyd Brothers and J. C. Lloyd were conspiring with the said publishing company to delay complainants and other creditors until the property

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Statement of the case.

embraced in the trust-deeds could be sold, when it was the purpose of the Lloyds to buy in all the said property, and thus cut off other creditors; that the Lloyds had removed the books and accounts of said publishing company from its office, and were secreting them.

The bill further alleges that the *corpus* of the company's assets, together with its franchises, were insufficient to pay the liens prior to complainants', but that the rents, issues, and profits arising from the property, if subjected to the payment of debts, could be made to pay such prior liens and also complainants' judgments. The bill, which was sworn to by an attorney of the complainants, prayed for the immediate appointment of a receiver to take charge of the property, and rent it out or carry on the business of said publishing company in such manner as would derive the greatest possible revenue therefrom.

The chancellor of the second district, to whom the bill was presented, was disqualified by reason of interest, and, having so certified, the bill was presented to Hon. T. B. Graham, chancellor of an adjoining district. The application for a receiver was made before process was served on the defendants, and without notice to them, the bill alleging that, "because of the limited time remaining before the maturity of the debts secured by said trust-deeds, the immediate appointment of a receiver is necessary to the protection of complainants' rights."

The chancellor appointed the receiver, as prayed in the bill, directing him to take charge of all the real and personal property of said publishing company, including its books of account and choses in action and franchises, and to use and employ the same in such manner as would derive the most possible benefit to all parties interested. The decree further empowered the receiver to employ necessary assistants to carry on and continue the business of the Meridian News & Publishing Company, including the publication of the daily and weekly newspapers. The receiver gave bond and quali-

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fied, and was placed in possession of the property by the sheriff, acting under a writ of assistance, which was expressly authorized by the decree. Thereupon the publishing company and Lloyd Brothers and J. C. Lloyd and the Savings Building & Loan Association and the trustees in their trust-deeds, who were parties defendant in the suit, prayed for and obtained an appeal, with *supersedeas*, from the decree appointing a receiver.

Hamm, Witherspoon & Witherspoon, and *Miller & Baskin*, for appellant.

The bill fails to charge the corporation with insolvency. On the other hand, it shows that it has assets of all kinds sufficient to pay its indebtedness. It shows that sufficient claimant's bonds have been executed and claimant's issues tendered. If it be true, as alleged, that the affidavits and bonds by claimants were tendered for the purpose of defrauding complainants, this could have been shown in the justice court, and the claims not only defeated, but damages recovered against the claimants. This fact should be decisive against an appeal to equity.

On the facts stated, it was error to appoint a receiver. See *Buckley* v. *Baldwin*, 69 Miss., 804; Wait on Insolvent Corporations, § 178. Unless there is imperious necessity therefor, a receiver should not be appointed upon an *ex parte* application without notice to defendants. 11 Md., 452; 55 Mich., 396. No sufficient reason is given in the bill for failing to give notice. See 87 Ala., 333, 734; 2 Paige, 150; 30 Iowa, 160; *Whitehead* v. *Wooten*, 43 Miss., 523; 20 Am. & Eng. Enc. L., 28.

Fewell & Brahan, *W. R. Woods* and *McIntosh & Williams*, for appellees.

No briefs on file.

CAMPBELL, C. J., delivered the opinion of the court.

The appointment of a receiver without notice to the de-

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Statement of the case.

fendants, and before answer, or even service of process, was not justified by the facts stated; and, besides, the order appointing the receiver was too broad, in embracing the publication of a daily and weekly newspaper—rather a novel business for a chancery court to engage in. The bill presents a case for the aid of chancery to enable the creditors to obtain their rights by subjecting the assets of the debtor to the payment of the judgments as prayed, but the rights of the complainants could have been preserved, and the danger of transfer of property apprehended, been averted by injunction, and without resorting to the harsh means of an order for a receiver before process and without notice. There is less objection to appointing a receiver without notice now, under the law which requires a bond of the complainant in such cases, than before. Code of 1892, § 575.

Decree reversed and appointment vacated.

JUDGE WOODS takes no part in this decision.

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WILLIAM NAUL *v.* MCCOMB CITY.

1. CRIMINAL LAW. *Evidence. Town ordinance. Judicial notice thereof.*

This court will not take judicial notice of town ordinances. Hence, in a prosecution for the violation of an alleged ordinance, a conviction will not be sustained if the evidence fails to show its existence.

2. CRIMINAL PROCEDURE. *Sale of liquors. Evidence of distinct sales.*

Where it is alleged that accused unlawfully sold spirituous liquors, it is error to admit evidence of two distinct sales. *King* v. *State*, 66 Miss., 502; *Bailey* v. *State*, 67 *Ib.*, 333.

FROM the circuit court of Pike county.

HON. W. P. CASSEDY, Judge.

Appellant, Naul, was convicted before the mayor of McComb City upon an affidavit charging that "within the cor-

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porate limits of McComb City, in Pike county, Mississippi, and within the jurisdiction of the undersigned, he, Naul, did unlawfully and wilfully sell spirituous liquor without authority of law, and against the ordinances of said town made and provided, and against the peace and dignity of the state of Mississippi." He appealed to the circuit court, and there made a motion to quash the affidavit, which was overruled.

After one witness for the prosecution had testified that he bought whisky from the accused on a certain occasion, another witness was permitted to testify to another and distinct sale. Defendant objected generally to this testimony, and the objection was overruled. He was again convicted, and sentenced to pay a fine of $100. From this judgment he appeals. The opinion contains a further statement of the facts.

Price & Sternberger, for appellants.

1. It was error to allow evidence of two separate sales. *King* v. *State*, 66 Miss., 502; *Bailey* v. *State*, 67 *Ib.*, 333.

2. There is nothing to show that McComb City has an ordinance against the sale of whisky. If it has, this is a fact to be proven like any other fact. 17 Am. & Eng. Enc. L., 262. Courts do not take cognizance of town ordinances. *Ib.*, 362.

Frank Johnston, attorney-general, for the state.

The objection to the evidence of a distinct sale was general. The record does not show the ground of the objection, nor present the point now argued; hence *King* v. *State*, 66 Miss., 502, does not apply.

The offense should be treated as one under the laws of the state against retailing, and in this view the conviction was proper.

COOPER, J., delivered the opinion of the court.

Although this case appears on the docket of this court, and did so appear on that of the court below, as a prosecu-

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Syllabus.

tion for the violation of a state law, the affidavit, which is the foundation of the proceeding, clearly shows it to be a prosecution for the violation of an ordinance of McComb City. We do not know, and cannot be informed, except by the record, that there is an ordinance of said town against the act charged, for we do not take judicial notice of town ordinances. There is nothing of record to show the existence of such ordinance, and, so far as is disclosed, the appellant is under sentence for an act not prohibited by any other law than that of the state, for a violation of which he is not prosecuted.

But, if there is an ordinance of the town against selling liquor, the conviction could, in no event, be maintained, because of error in the court in admitting evidence of two distinct sales. In *King* v. *State*, 66 Miss., 502, this question was fully considered and decided, and that case was followed in *Bailey* v. *State*, 67 Miss., 333. We now follow it again, with the hope that by patience and persistence we shall eventually establish the rule it announces.

Reversed.

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STATE REVENUE AGENT v. THEODORE TONELLA.

1. ASSESSMENT FOR TAXATION. *Who may make. Legislative power.*

Assessment for taxation can only be made by the officer designated by law; and where the constitution devolves the duty of assessing upon a certain officer, the legislature cannot substitute another.

2. ASSESSOR. *Functions of. Constitutional scheme. Const.* 1890, §§ 112, 138.

The constitution of 1890 (§ 112), in requiring that taxation shall be uniform and equal, and that assessment for taxation shall be under general laws and by uniform rules, according to value, contemplates that such assessment shall be made by the assessor provided for by § 138 thereof, selected for each county and having the well-known functions that have heretofore pertained to that office.

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Brief for appellant.

3. STATE REVENUE AGENT. *Assessment by. Code* 1892, *ch.* 126. *Constitutionality.*

Chapter 126, code 1892, in so far as it provides that the state revenue agent may assess for *ad valorem* taxes property within this state that has escaped taxation, and may collect the taxes thereon, is a departure from the constitutional scheme of securing uniform and equal taxation through assessment by local assessors in each county, and is therefore unconstitutional.

FROM the circuit court of Warren county.

HON. J. D. GILLAND, Judge.

The opinion states the case. It will be observed that the decision has no reference to that part of § 112 of the constitution authorizing the legislature to provide for a special mode of valuation and assessment for railroads and other property not situated wholly in one county.

Calhoon & Green, for appellant.

To the argument that the power of assessing taxes is vested by the constitution in an assessor to be elected by the people, and that the legislature cannot vest it in another, we say:

1. The powers of the assessor and collector, vested by the constitution, extend only to the right of assessment and collection for the current fiscal year. In the absence of a statute, it is not the collector's duty to collect delinquent taxes. *State* v. *Harris*, 52 Miss., 686; *Foote* v. *Brown*, 60 *Ib.*, 155; *Cowart* v. *Foxworth*, 67 *Ib.*, 322. *A fortiori*, the rule would apply to assessors.

2. The constitution of 1890, adopted after these decisions, is silent as to the collection of delinquent revenue. The power previously exercised under statutes was thus impliedly recognized.

3. Legislative power over the person who assesses and collects current revenue has been increased by the constitution of 1890 in this, that they may now be appointed, or chosen in any way provided, whereas before they were elective. Const. 1890, § 138.

4. Under the constitution of 1869, the legislature had power

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to provide for the performance of the duties of the assessor when he had failed to perform them as to current revenue. *Wolfe* v. *Murphy*, 60 Miss., 1; *Corburn* v. *Crittenden*, 62 *Ib.*, 125.

5. By § 513, code 1880, the collector could assess, even for the fiscal year, where the assessor failed to do so. *State* v. *Adler*, 68 Miss., 487. It is manifest that the legislature, under the constitution of 1869, could provide for the assessment of revenue made delinquent through the failure of the assessor. The clerk of a court is elective, but a deputy may do all his official acts. *McRaven* v. *McGuire*, 9 Smed. & M., 34 s.c. 23 Miss., 100. Even judges are created by statute to perform judicial duties which constitutional judges are unable to perform. *Grinstead* v. *Buckley*, 32 Miss., 148.

6. Unless the constitution prescribes another method, the legislature may provide for assessment of omitted property. Welty on Assessments, 36, 37, 197.

7. It was the duty of defendant to give in his property for taxation. Both he and the assessor are delinquents, and they cannot complain if their default caused the non-application of the constitutional scheme. The rights of the state alone remain to be cared for, and it may protect its revenue in any way it may see proper. *Vaughn* v. *Swayzie*, 56 Miss., 704.

8. Under the code of 1892, there can be no conflict of authority between the assessor and the revenue agent, as the latter deals only with property delinquent after the fiscal year. A party who is delinquent is not entitled to notice. If he is, suit is notice, and full opportunity is then given to him to be heard.

R. H. Thompson, on the same side.

1. It is argued that the constitution vests the power to assess and collect taxes in certain officers, and that the legislature cannot authorize this to be done by the revenue agent. To this I reply: The fundamental idea of all tax-laws is equality and uniformity. Failure by the citizen to render

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Brief for appellant.

his property for taxation violates this idea, and failure by the officers primarily charged with the duty of listing taxable property, likewise violates it. Tonella and his co-defendants have so acted as to deprive the state, county and city of revenue justly due. They cannot be heard to complain. Their conduct is contrary to good morals, and wrong. It has been decided that, under the law prior to the code of 1892, the only legal remedy in cases like this was against the bond of the delinquent officer. But this is changed by chapter 126, code 1892, which provides an instrumentality for securing the primary object of every section of the constitution pertinent to the subject of taxation. The question is, can the owner of taxable property wholly escape the burdens of government by procuring a failure of duty by the assessor and collector? If so, the taxes of the very rich need never exceed the penalty of the bond of these officers. I submit the remedy now provided is constitutional.

Assessment is a prerequisite, and property that has escaped assessment may be afterwards assessed. It is not necessary that this be done by the assessor. It has been decided the collector may assess in certain cases. The assessor, therefore, has not a monopoly of assessing. In *French* v. *State*, 52 Miss., 759, which this court, in *State* v. *Thibodeaux*, 69 Miss., 92, said held that the sheriff and tax-collector have rights which cannot be taken from them, did not involve any question of legislative power, but only the question whether a statute existed requiring a separate bond as tax-collector. Whatever rights the officer may have had, the failure to exercise them at the time required by law worked a waiver of them. The abstract question is, whether any officer has the right to prevent the state from collecting its revenue. Tonella has no such right, even if the officers have.

2. The statute under consideration does not deprive of property without due process of law. The legislature may provide for the assessment of taxes not paid in past years. See *Yazoo Railroad Co.* v. *Thomas*, 65 Miss., 553. Since it

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is not denied the state may proceed through the assessor and tax-collector, no reason can be found why it cannot do so in any manner legislative wisdom may devise. Here we have the assessment, and the statute authorizing it. Surely the legislature may provide for the bringing of a suit for delinquent taxes. Such a remedy is provided by chapter 126, code 1892.

Murray F. Smith and *J. Hirsh*, for appellee,

Filed a brief and written argument, and, as to the question passed on by the court, making the following points: The power of the revenue agent is limited under any circumstances, as to tax-payers, to doing what the assessor or tax-collector has the power to do, and has failed to do. There is nothing in the revenue law to create, in favor of the revenue agent, a new scheme for the assessment and collection of taxes. There are certain officers created by the constitution—namely, the assessor and sheriff—upon whom are primarily imposed the assessment and collection of the revenue of the state and its subordinate divisions. We submit that no such power can be vested in any other officer.

Argued orally by *R. H. Thompson*, for appellant, and *Murray F. Smith* and *J. Hirsh*, for appellee.

COOPER, J., delivered the opinion of the court.

This is a suit by the revenue agent of the state, Wirt Adams, against Theodore Tonella, a resident of the city of Vicksburg, in the county of Warren, and Brennan and Sproules, sheriff and assessor of said county of Warren, and Keirsky, the assessor of the city of Vicksburg.

The declaration avers that, during the year 1891, the defendant, Tonella, was the owner of certain personal property, to wit, "notes, accounts and valid securities for loaned money," of the value of $7,200, which was subject to assessment, and liable to taxation for said year in said county and

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city; that the levy for state and county taxes for the year 1891 was twelve mills on each dollar of taxable property, and that for city taxes was twenty mills on the dollar; that it was the duty of Tonella to return said credits for assessment and taxation, and was also the duty of said assessors and collector to have caused the same to be assessed according to law, which they wilfully failed and neglected to do; that in September, A.D. 1892, the plaintiff, as by law he was authorized to do, assessed the said credits to the defendant, Tonella, and reported the same to the proper officers, to be by them noted on the assessment-rolls, and gave notice of his action to Tonella. The plaintiff demanded judgment against Tonella for $144, the amount claimed as taxes due to the city of Vicksburg, and for $86.40 as state and county taxes. He also demanded judgment against Brennan, the sheriff, and Sproules, the county assessor, and Keirsky, the city assessor, for the amount of the commissions to which plaintiff would be entitled if successful in this suit.

The defendants demurred, and their demurrer having been sustained, the plaintiff appeals.

The office of state revenue agent is created, or the statutes relative to the same revised and amended, by chapter 126 of the code of 1892. The first three sections of the chapter—4187, 4188, and 4189—have relation to the creation, election and qualification of the officer. The last nine sections relate to the procedure by the agent to enforce the payment of taxes after they have been imposed, or to other matters not now necessary to review. The question involved in the present suit arises from a consideration of §§ 4190, 4191, 4192 and 4193, which are as follows:

"SEC. 4190. After the expiration of the fiscal year in which the taxes become due and payable, and that, too, whether the taxes were assessed or properly assessed or not, the revenue agent may assess and collect all past-due taxes, whether the same be caused by the default of the assessor, tax-collector or tax-payer; but if the revenue agent institute suit

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against any person or corporation who has been correctly assessed, and the taxes so assessed paid, he shall be liable on his bond to such person or corporation for all costs and expenses incurred in defending such suits, if the judge will certify that the suit was frivolous, or that there was no ground for the action.

"SEC. 4191. It is the duty of the state revenue agent to investigate the books, accounts and vouchers of all fiscal officers of the state, and of every county, municipality and levee board, and to sue for, collect and pay over all revenue improperly withheld from either; and he has power, and it is his duty, to proceed against all such officers and their sureties by action to recover any such revenue; and it is his duty to proceed, by suit in the proper court, against all officers, persons, corporations, companies and associations of persons, for all past-due and unpaid taxes owing to the state, counties, municipalities and levee boards, whether *ad valorem*, privilege, license, poll or other, and whether assessed or properly assessed or not, if the fiscal year in which the same ought to have been paid have expired; and his duty to proceed by suit for the collection of any such taxes arises whether the failure to pay the taxes originated from the neglect or failure of any officer or board to perform his or its official duty, or from the failure of any person or corporation to fully give in his or its property to the assessor, or at a sufficient valuation, or otherwise. But his right and duty to collect money from a fiscal officer, where the delinquency appears by correct open account on the books of the proper accounting officer, shall only arise after he have given thirty days' notice to the officer to pay over the amount, and his failure to do so.

"SEC. 4192. It is the duty of the state revenue agent, when any person, corporation, property, business, occupation or calling liable to an *ad valorem* or privilege tax has escaped or shall escape taxation by reason of not being assessed or of not being demanded, or otherwise, to assess the same as the

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tax-collector is authorized to do, and to collect and pay over the taxes thereon in like cases. He shall report all additional assessments, in writing, to the tax-collector, whose duty it will be to enter the same on the assessment-roll, as in case of an assessment by him, only he shall note that the assessment is made by the state revenue agent. The taxes on all such additional assessments may be recovered by the state revenue agent by action, if not paid within ten days after notice to the party assessed, if he be a resident of the state, or, if a non-resident, within ten days after the date of the assessments; and the proceedings may be against the person or property assessed, or both.

"SEC. 4193. The state revenue agent shall not assess taxes accruing prior to the year 1886; and in all cases the burden of proof shall be on the agent to show that the property or person was not assessed, or properly assessed; and the person assessed or re-assessed shall have ten days notice, in writing, before bringing suit. But when the revenue agent shall think property which has been assessed and approved by the board of supervisors, has been improperly assessed, he shall notify the board of supervisors, and summon the party assessed to appear before it for a rehearing. The board shall hear both parties, and decide the matter of difference, from which either party may appeal."

Section 112 of the constitution of 1890 declares as follows: "Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. . . . Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

Under the constitution of 1869, the provision was that "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." Art. 12, § 20.

By § 21, art. 5, of the constitution of 1869, it was provided: "A sheriff, coroner, treasurer, assessor and surveyor shall be elected in each county by the qualified electors thereof,

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who shall hold their offices for two years, unless sooner removed."

Section 138 of the constitution of 1890, is as follows: "The sheriff, coroner, treasurer, assessor, surveyor, clerks of courts and members of the board of supervisors of the several counties, and all other officers exercising local jurisdiction therein, shall be selected in the manner provided by law for each county."

The provisions of our revenue laws for the assessment of property for taxation (aside from those of chapter 126 of the code of 1892, now under consideration) have remained practically unchanged since the adoption of the code of 1871. Every person owning property subject to taxation is required to render a schedule thereof, with its value, under oath, and upon a form supplied by the assessor. If the property inventoried is, in the opinion of the assessor, undervalued, he is required to make report thereof to the board of supervisors, under oath, and he may add to his roll any property discovered by him not returned by the owner. At stated times, fixed by law, the board of supervisors meet to examine, correct, and equalize the assessments, and, this being done, they enter an order approving the rolls. Any person feeling himself aggrieved by any order of the board in reference to the assessment of property, may appeal to the circuit court. Two copies of the roll, as approved by the board, are then made by the clerk of the board, one of which is delivered to the collector and the other to the auditor, the original remaining in the office of the clerk. The roll delivered to the collector is the authority by which he collects the taxes levied. It is also provided by law that the collector may add to the roll any property he may discover as unassessed after the roll comes to his possession, making return of such additional assessment to the board of supervisors. If, at any time, the assessor shall discover that any person or property has escaped taxation in former years, it is his duty to assess the same, making due return thereof with his next assessment,

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and giving the person who, or whose property, is thus assessed notice thereof, if he be a resident of the county.

The primary purpose in all just schemes of taxation is to distribute its burdens equally and uniformly upon all persons and property, and the requirement of our constitution that all property shall be taxed in proportion to its value, is but the statement in another form of the provision that taxation shall be equal and uniform. If all property was assessed at one-half or one-third its value, the rule of uniformity of taxation would not be disturbed. But the constitution, in providing for the office of assessor, and confining the officer to the territorial limits of his county, divided the state into as many taxing districts as there are counties; and since, if one rule of valuation should be adopted in one county and another in another, there would not be equality of taxation, it prescribed the standard of valuation for all property in all the counties should be the real value.

The office of assessor, spoken of in § 138 of the constitution, is one of known and settled functions, and in providing that an assessor should be selected, in the manner provided by law, for each county, it is to be presumed that the framers of that instrument intended to provide for the performance by him, substantially at least, of those duties which have hitherto pertained to his office. *French* v. *State*, 52 Miss., 760.

The constitution declares the rule of uniformity and equality of taxation; it fixes the standard of valuation by which that rule shall be preserved and enforced; it provides for the selection of an officer for each county to perform the duties of assessing persons and property. It is silent as to details, leaving to the legislature the power and duty of formulating the scheme of taxation, subject to the restrictions imposed by the general provisions it does contain.

Unquestionably, the constitution contemplates and requires an assessment of property as a condition of its taxation. Assessment is the listing and valuation of property liable to taxation according to law. It is essential for the apportion-

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ment of all *ad valorem* taxes. Cooley on Taxation, 259. And an assessment can only be made by the officer designated by law to make it. Welty on Assessments, § 10. When the constitution devolves that duty upon a particular person, the legislature may not substitute another. Welty on Taxation, § 10; *People* v. *Kelsey*, 34 Col., 473; *People* v. *Hastings*, 29 *Ib.*, 450; *People* v. *Sargent*, 44 *Ib.*, 434; *Houghton* v. *Austin*, 47 *Ib.*, 646; *Richmond & Danville Railroad Co.* v. *Commissioners*, 74 N. C., 506; *Railroad Co.* v. *Commissioners*, 72 *Ib.*, 10.

In *Houghton* v. *Austin*, above cited, the rule that the legislature could not devolve the duty of assessing property upon any other tribunal or officer than the assessor provided for by the constitution, was carried to the extent of annulling a law creating a state board for equalization of taxation among the several counties of the state.

It is said by counsel for appellant that the power of the legislature to devolve the duties of the assessor upon others has been recognized in many decisions of this court. First, it is said that in *Wolfe* v. *Murphy*, 60 Miss., 1, the act of March 5, 1878, which provided that if the assessor should fail to complete his roll as required by law, the board of supervisors should "appoint some suitable person to make and complete such assessment-rolls, in the same manner as the assessor is required by law to do," was held to be a valid exercise of legislative power; and, second, that in *State* v. *Adler*, 67 Miss., 465, the authority of the collector to assess such persons or property as had been omitted by the assessor, as directed by § 513 of the code of 1880, was also upheld. It would be sufficient to reply that in neither of these cases was the validity of the legislation challenged by counsel or adverted to by the court. But it is to be observed that the statutes construed in these cases have existed in this state since the year 1846 (Hutch. Code, pp. 185–189, §§ 9–23), and were in operation at the adoption both of the constitution of 1869 and of 1890.

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Opinion of the court.

The code of 1857 provided that, upon failure of the assessor to make and return his roll as required by law, the board should have power to remove him from office, and to appoint some suitable person to complete the roll; and in *Wolfe* v. *Murphy* this court assumed, without expressly deciding, that the effect of the act of 1878 was to authorize the board to declare the office vacant *pro tempore*, and to appoint an incumbent.

The provisions of the statute authorizing boards of supervisors to appoint a suitable person to make the assessment when the assessor has failed to discharge his duty, and conferring power on the sheriff to add persons or property to the roll which have been omitted by the assessor, are widely different in their scope, purpose and effect from the scheme provided by chapter 126 of the code in relation to the state revenue agent. They are provisions to meet emergencies, and displace as little of the machinery by which a general and uniform plan of assessment is carried on throughout the state as is possible. They substitute one local officer for another, and, in case of the appointed assessor at least, the duties he performs are precisely those which should have been performed by the assessor, and are subject to the same supervision by the board of supervisors. But chapter 126 of the code displaces the whole scheme of taxation. It substitutes a state officer, provided for by law, for the local officer designated by the constitution. All idea of equality and uniformity of taxation and of assessment of property "under general laws and by uniform rules, according to its true value," is abandoned, and the discretion of the officer is the limit of his power. Every judgment of every board of supervisors since the year 1886 is, in effect, nullified. Any citizen whose horse or cow or land or other property has been assessed in all these years, and who has paid his taxes according to such assessment, is subject to be proceeded against by the agent. It is, indeed, the imperative duty of the officer to proceed in all cases in which, in his opinion, the valuation

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of property, as fixed by the tax-payer and the assessor and approved by the supervisors, was too little. Never before in the history of this state have such onerous duties been imposed upon, or such unlimited power vested in, a single person. We have said that all idea of equality and uniformity of taxation is abandoned. This is true, if the scheme is, in its nature, such that its practical operation must be effectual only in exceptional instances; for, if this be true, the law, though in form, is not in effect, a general law, prescribing uniform rules for the assessment of property of all the citizens of the state.

If the approval of values, as they have been fixed by the authorities charged with that duty, on all the rolls since the year 1886, could be nullified by the legislature, it would yet be necessary that any scheme in which no provision is made for preserving uniformity and equality of taxation would violate the constitutional provisions by which such equality and uniformity is declared. Now, if the revenue agent *may* proceed against any tax-payer whose property, in his opinion, has been undervalued, he *must* do so, unless his arbitrary discretion may be substituted for the legislative will. Nor can he proceed against one, and refuse to proceed against another standing in the same condition. But the agent cannot determine whether property has been undervalued in former years, unless he shall and can inform himself of its then condition and value, and this, being a matter of fact, must be decided upon some sort of evidence. No provision is, however, made for the investigation and decision of this preliminary fact, and the proceeding, when instituted, must rest upon the mere uninstructed discretion of the officer.

The question of value is one of the most difficult of solution in the administration of the law. One man may value an article at one price, and another at another, and another at another, and all be equally honest in their action. But it is also a relative question, for the value of one horse or cow or tract of land is largely determinable by the value of other

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horses and cows and lands at the same time and place. When the agent proceeds to re-examine the value of property assessed in years past, no just conclusion could be reached without consideration of the property of others assessed on the same roll. If the valuation of the property of one man is increased, so also must be that of every other man, if it has been undervalued, otherwise the principle of uniformity and equality is departed from. It is to be remembered that in all the assessments which are reopened by the law under consideration, the boards of supervisors had been charged with the duty of examining and *equalizing* the rolls; and, if this was done, as must be presumed, any action by the revenue agent in changing one assessment would disturb the uniformity and equality of the burden, unless his jurisdiction may be considered as a revisory one, and his finding of the fact of undervaluation of particular property be considered as a judicial determination that all other property appearing thereon had been assessed at its true value.

It has long since been decided in this state that it is not within the legislative power to provide by retroactive legislation for the reopening of judgments final in their nature, and under which rights had become vested. *Hooker* v. *Hooker*, 10 Smed. & M., 599. *A fortiori*, can it not annul them by a mere legislative declaration.

When we consider the duty and power of the agent to collect taxes on property which has escaped taxation, the provisions of the law are found yet more objectionable. As to such property, the agent, without notice to the tax-payer, and without giving him an opportunity to be heard, determines that certain property of a certain valuation should be assessed against a particular person. He thereupon notifies the collector to place such property on the roll, and, having given the owner ten days notice of his action, may, in default of payment of the tax claimed, proceed by suit to recover the amount. It is true the act calls this an assessment, but it is not such in fact. No opportunity to be heard

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in reference to the assessment is afforded to the citizen. His first information is that his property has been assessed by the *ex parte* act of the agent, and a liability fixed upon him upon which suit will be brought, unless immediate payment is made. He must, it is true, be summoned to defend the suit at law, and may then disprove the legality of the assessment, which becomes final against him only upon full hearing before the court. But the question is, not whether the assessment is conclusive against the citizen when the suit is brought, but it is whether he may be subjected to a suit at all unless a tax is due by him at the time, and whether a tax is ever due until assessment duly made in conformity to the constitution. Either what the agent does before suit brought is an assessment of the property, fixing liability for its taxes, which liability is the foundation and support of the suit at law, or there is no assessment at all preceding the suit, and the anomaly is presented of an action on a non-existing cause of action, with power in the plaintiff to create, pending the action, the right of action on which the suit rests.

We are not certain that we appreciate the precise position of counsel. The assumption runs throughout their briefs that a person owning property which has not been assessed, is a delinquent who cannot complain of any legislation having for its purpose the taxation of the property. Counsel do not expressly declare that such persons are not entitled to the protection of the constitution, but they suggest that, having failed to obey the law by giving in their property for taxation when all other property was assessed, such delinquents should be left to be dealt with at the discretion of the legislature. But the fact that such persons may have violated the law, either by neglecting or wilfully refusing to return their property for taxation, is no reason why constitutional safeguards, provided for the protection of all classes, should be destroyed or ignored. The question is not one of policy, but of power; and, if it is competent for the legislature to dispense with an assessment of property as to one class, it would

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be equally within its power to dispense with it for any or all other classes.

It is not too much to say that, if it were possible for one man to perform the duties of the office of revenue agent according to the provisions of the code, there are not enough courts in all the states to determine in a life-time the suits which would be brought in one year. But it is obvious that no purpose is disclosed of preserving the rule of uniformity and equality prescribed by the constitution. The evident purpose is to vest power in the agent to sue in the most flagrant instances of undervaluation of property heretofore taxed, or of non-assessment. Each case stands separate and distinct from each other, and, in lieu of the local agencies provided by the constitution, with local tribunals for equalization of values, the scheme of the act is to vest unlimited power and discretion in a state officer, with a trial by jury in each suit to finally settle the question of valuation. This is a total departure from the scheme of the constitution, and it is therefore invalid.

The judgment is affirmed.

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S. L. McBride et al. *v.* State Revenue Agent et al.

1. Chancery Jurisdiction. *Fraudulent conveyances. Constitution* 1890, § 159. *Code* 1880, § 1843.

   Section 159, constitution 1890, by conferring on the chancery court jurisdiction in all cases of which it had jurisdiction when the constitution was put in operation, confirmed in that court the jurisdiction it possessed under § 1843, code 1880, of bills exhibited by creditors without judgment to set aside fraudulent conveyances and other devices to hinder and delay creditors. Such jurisdiction is not affected by § 31 of the said constitution, declaring that the right of trial by jury shall remain inviolate.

2. Same. *Vacating collusive attachments. Remedy at law.*

   Accordingly, such creditors may proceed in the chancery court to vacate attachments fraudulently sued out through collusion with the debtor,

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Brief for appellants.

and to subject the attached property to their demands, and this though, by statute, they have a remedy at law by intervening and contesting the attachments. *Cogburn* v. *Pollock*, 54 Miss., 639.

3. Constitutional Law. *Penalties. "Due process of law." Const.* 1890, § 14.

A legislative act providing for the infliction of a penalty and its collection by summary process, without a judicial proceeding adjudicating the liability, is taking private property without due process of law, and is therefore unconstitutional. Const. 1890, § 14.

4. Same. *Sale of liquors. Penalty. Code* 1892, § 1590, *unconstitutional.*

Section 1590, code 1892, in providing that any person unlawfully selling or giving away liquors shall be liable to the state, town and county, each in the sum of $500, imposes a penalty, not a tax. And so much of the section as provides that the sheriff or state revenue agent can assess and collect such penalties by distress is unconstitutional, being within the prohibition of § 14, constitution 1890, against depriving of property without due process of law.

5. Same. *Revenue agent. Action for penalties. Code* 1892, § 1590.

The state revenue agent cannot maintain an action for the penalties prescribed by said § 1590, code 1892, against persons unlawfully selling or giving away liquors. The section itself confers the right of action only on the state, county or town, and chapter 126 of said code, entitled "State Revenue Agent," confers on him a right of action only against fiscal officers and against persons owing unpaid taxes, and the penalty prescribed is not a tax.

From the chancery court of the first district of Carroll county.

Hon. T. B. Graham, Chancellor.

The case is stated in the opinion.

Percy R. Somerville, for appellants.

The jurisdiction of the circuit court was first invoked by one of the appellees. That jurisdiction cannot now be ousted by a resort to equity, even though the relief prayed be peculiar to equity. 1 Pom. Eq. Jur., § 179, and cases cited. Trial by a jury is a constitutional right, and will be protected.

Section 503, code 1892, does not alter or enlarge the jurisdiction of chancery courts, except where creditors are permitted to file bills before obtaining judgment. The statutory

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Brief for appellees.

right of the complainants to intervene in the attachment suits is admitted. Thus they have a complete remedy at law. *Learned* v. *Holmes*, 49 Miss., 290; *Weddell* v. *Seal*, 45 *Ib.*, 726; *Irwin* v. *Lewis*, 50 *Ib.*, 363. Notwithstanding the *dictum* in *Lowenstein* v. *Aaron*, 69 Miss., 341, I submit that the litigant cannot himself invoke the jurisdiction of law, and then abandon that forum without any averment that his remedy there is inadequate.

So much of § 1590, code 1892, as prescribes the penalty of $1,500 against one unlawfully selling liquors, and making it the duty of the sheriff or state revenue agent to attach therefor, is unconstitutional. It provides a penalty, not a tax. It is an extremely harsh and stringent statute, and makes no provision for a judicial determination of the question of liability. It provides for attachment without bond by such officers, when informed of the sales or gifts of liquors. What becomes of § 23, article 3, of the constitution prohibiting unreasonable seizures?

I submit that the revenue agent is not such a creditor as is contemplated in § 503, code 1892, providing that the creditors may attack fraudulent conveyances, as his acquiring a lien must be confined to the prescribed method of attachment.

A. H. Somerville and *Southworth & Stevens*, on the same side.

Thos. H. Somerville, for appellees.

The answer to the argument as to jurisdiction is, that under our code the jurisdiction of the circuit and chancery court is concurrent as to setting aside fraudulent conveyances. Complainants had the right to elect their forum, and have exercised it by filing their bill. None of them have intervened in the circuit court; besides, those of the complainants who have not attached are without any adequate remedy in the circuit court. The intervenors in the attachments could not subject the property to their claims. But the question of jurisdiction is settled in this court by *Lowenstein* v. *Aaron*, 69

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Miss., 341. The equities of all the parties, could be adjudicated without the issuance and service of an injunction. *Howard* v. *Proskauer*, 57 Miss., 247.

The penalties which the state revenue agent seeks to recover are due the state, county and town respectively. He has full authority under the statute. The attorney-general and district attorney are authorized to bring such suits. Code 1892, §§ 180, 1561.

Cooper, J., delivered the opinion of the court.

Certain creditors of the firm of McBride & Co., and Wirt Adams, revenue agent of the state, exhibited their bill in the chancery court of Carroll county against the members of said firm and against S. L. McBride, E. S. Tusten, Peavy & Harris and Mrs. M. C. Hamilton, attaching creditors of McBride & Co., and against J. S. McCain, the sheriff of the county of Carroll, who has in his possession the property of said firm, seized under said attachments. The averments of the bill are that McBride & Co. were indebted to the complainants, other than the revenue agent, in certain sums, and were indebted to the said revenue agent in the sum of $1,500, viz., $500 for the use of the state of Mississippi, $500 for the use of the county of Carroll and $500 for the use of the town of Carrollton, because of the unlawful sale by said firm of intoxicating liquors in their drug store, in the town of Carrollton, on or about January 1, 1893; that the revenue agent, on the twenty-first of January, A.D. 1893, assessed and demanded the penalties due him by McBride & Co., and thereupon, said firm and S. L. McBride, the father of one of the members of said firm and the uncle of the other, and E. S. Tusten, the mother-in-law of one of said members, colluded and conspired to defeat the claims of said revenue agent and the other complainants; and, to carry out their scheme, said S. L. McBride and E. S. Tusten sued out collusive attachments against the estate of McBride & Co., founded upon simulated demands; that several grounds of attachment are set forth

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in the affidavits of said attaching creditors, but, as complainants are informed, the one principally relied on is the tenth, specified in § 129 of the code of 1892, viz.; "That the defendants are buying and selling, or dealing in, or have, within six months next before the suing out of the attachment, directly or indirectly, bought, sold or dealt in future contracts, commonly called 'futures.'" Complainants allege that, if this ground of attachment be true, the act was performed by McBride & Co. collusively with S. L. McBride and Mrs. Tusten, and for the fraudulent purpose of affording them ground for attachment, in order that complainants, as creditors of McBride & Co., should be defrauded and hindered in the collection of their debts.

The complainants show that, after the attachments of S. L. McBride, E. S. Tusten and Peavy & Harris had been sued out and levied upon the estate of McBride & Co., Wirt Adams, as revenue agent, sued out an attachment, and afterwards the defendant, Mrs. Hamilton, sued out her attachment, both of which were levied on the same property, the value of which is insufficient to pay all the attachments levied.

The prayer of the bill is that the fraudulent and collusive attachments be vacated and displaced and the levies thereof be dismissed, and the property sold and its proceeds applied to the payment of complainants' demand.

The defendants filed answers, denying the frauds charged against them, and demurred. Their demurrer was overruled, and they now appeal. The grounds of demurrer assigned are (1) want of equity on the face of the bill; (2) because complainants have a full, adequate and complete remedy at law; (3) because a court of chancery has no jurisdiction; and, as to the relief prayed by the revenue agent, (4) that he had no right to maintain the bill, and (5) that he fails to show that he is a creditor of McBride & Co.

The appellants contend here that the exercise of jurisdiction by the chancery court is a violation of § 31, constitution

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1890, which declares that "the right of trial by jury shall remain inviolate."

The first three grounds of demurrer are decided adversely to appellants by the case of *Cogburn* v. *Pollock*, 54 Miss., 639.

In reply to the argument that, to uphold the jurisdiction of equity to subject the attached property to the demands of complainants would be to deny to the defendants their right to a trial by jury, it is only necessary to say that, with us, this question is concluded by our recent constitution. In *Scott* v. *Neely*, 140 U. S., 106, the supreme court of the United States declined to entertain the jurisdiction in equity conferred by § 1843, code of 1880, upon the ground that, to do so, would be violative of the right of the defendant to a trial by jury, secured by the seventh amendment to the constitution of the United States. On the other hand, such statutes have been supported in several states. The subject was fully discussed by the supreme court of Alabama, and the authorities reviewed, in *Railroad Co.* v. *McKenzie*, 85 Ala., 546; and, in the same case, on a subsequent appeal (11 So. Rep., 367), and the jurisdiction of equity upheld.

But, by the constitution of 1890, this jurisdiction was expressly conferred upon our court of chancery. Section 159 declares: "The chancery court shall have full jurisdiction in the following matters and cases: (*a*) All matters in equity; (*b*) divorce and alimony; (*c*) matters testamentary and of administration; (*d*) minors' business; (*e*) cases of idiocy, lunacy and persons of unsound mind; (*f*) all cases of which the said court had jurisdiction under the laws in force when this constitution is put in operation."

The code of 1880 was in force when the constitution became operative, and, by § 1843 thereof, it was provided that "the said [chancery] courts shall have jurisdiction of bills exhibited by creditors who have not obtained judgments at law, or, having judgments, have not had executions returned unsatisfied to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hin-

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dering, delaying or defrauding creditors, and may subject the property to the satisfaction of the demands of such creditors, as if complainant had a judgment and execution thereon returned no property found."

The only remaining question is whether the demand made by the revenue agent is such as may be enforced by him in this action?

Section 1590 of the code of 1892 is as follows: "Any person who may sell or give away liquors unlawfully, or allow the same to be sold or given away at his place of business, for any purpose whatever, shall be subject to pay the state, county and the city, town or village where the offense is committed, each, the sum of five hundred dollars; and it shall be the duty of the sheriff and state revenue agent, or either, to assess and collect such sums whenever he is informed that such sales or gifts have been made; and such persons shall be liable to a criminal prosecution, as in other cases, and, in addition, the state, county, city, town or village may sue for and recover civilly, either jointly or separately, each, the said sum of five hundred dollars; and such civil suit may be commenced by attachment without bond."

The original of this section is found in § 1109, code 1880, which was as follows: "Merchants and others carrying on any business or trade, who may sell or give away liquors, either vinous or spirituous, at their places of business, in less quantities than one pint, for any purpose whatever, shall be subject to pay the regular retail tax fixed by the county or corporate authorities of the place where such business is conducted; and it shall be the duty of the sheriff to assess and collect such tax whenever he is informed that such sales or gifts have been made; and such persons, on conviction, shall be fined in a sum not exceeding one hundred dollars."

By section two of the act of February 24, 1890 (Laws, p. 11), it was further provided that persons unlawfully retailing vinous, spirituous or malt liquors should be civilly liable to the state for the highest amount such person should have

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paid for the privilege of retailing. Section 1590 was doubtless formulated from section 1109 of the code of 1880 and the act of February 24, 1890. But there is a fundamental and radical difference between the former laws and this section. In effect, the former laws declared that the unlicensed dealer in intoxicating liquors should not escape the tax imposed by law for the privilege. They were intended to coerce payment of the privilege tax which the dealer should have paid before engaging in the business, and, under § 1109, code 1880, the sheriff, as tax-collector, was empowered and directed to collect the sum the party should have paid. Manifestly, the collection was to be by distress, unless payment should be made on demand, and, as a tax, the remedy for its collection was the ordinary and usual one. By the act of February 24, 1890, a civil liability, subjection to the ordinary suits at law, was also declared in favor of the state. But the right to institute or prosecute the civil suit was not vested in the tax-collector; the collection he was to make was by distress, for the charge was yet treated as a tax, to be collected as such, with the added remedy of a civil action by the state, to be prosecuted by such agencies as it should designate.

Section 1590, code 1892, manifestly and without doubt, imposes a penalty and not a tax, a part of which is given to the municipality in which the "offense is committed." Though the very nature and character of the charge is thus changed, the language of pre-existing statutes was retained, and the sheriff and revenue agent were authorized and directed to assess and collect the sums for payment of which the offender was made liable.

It certainly requires no argument or citation of authorities to uphold the proposition that it is not within the power of the legislature to provide for the infliction of a penalty, and its collection, by summarily, without a judicial proceeding, fixing it upon the party to be charged. The constitutional provision, by which it is declared that "no person shall be deprived of life, liberty or property except by due process of

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law" (constitution 1890, § 14), would be practically abrogated if it should be held within legislative competency to commit to the hands of an executive officer the exercise of the power of seizing the property of the citizen to enforce an unadjudged penalty.

The decision of this court upon the questions which have been presented touching the constitutionality of legislation in reference to this officer, the revenue agent, have all been along the same line, and within narrow limits. We have felt constrained, by our duty under the constitution, to declare that the legislature may not devolve upon him the absolute power to adjudge a delinquency and enforce a mere legislative sentence, nor to displace the machinery of the constitution and substitute its own for the assessment and collection of taxes.

We have declared that it is competent for the legislature to direct and declare in what manner and by what persons existing rights of action of the state or a municipality may be prosecuted. But we have held, and must always hold, that the state may not, by a mere legislative declaration, create a right and enforce it by its executive officer, and we must now decide that so much of § 1590, code 1892, as authorized the sheriff and revenue agent to assess and collect by distress the penalty thereby imposed, is violative of § 14 of the constitution of 1890. The penalty prescribed is not a tax, and it is not and cannot be made one by the mere authority to "*assess*" it as such.

It is unfortunate that the civil action given to the state, counties and municipalities by the concluding clause of the section was not authorized to be instituted by the revenue agent, as it well might have been. But the right to sue is, by the clause, limited to the state, county or municipality, and is not conferred on this officer.

We have carefully considered the provisions of chapter 126, on the subject of the state revenue agent, with the hope of finding some authority therein given to the agent to main-

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tain this suit, but have discovered none. The suits authorized by that chapter are limited to actions against delinquent fiscal officers, or against persons owing unpaid taxes, and, as we have said, the penalty imposed by § 1590 is not a tax.

Reversed, demurrer sustained and bill dismissed as to Wirt Adams, revenue agent; otherwise affirmed, and cause remanded, with leave for answer in thirty days after mandate filed.

ELIZA ROSE *v.* LOUISVILLE, NEW ORLEANS & TEXAS RAILWAY CO.

1. DAMAGES. *Implied from tort. Instruction.*

In an action of tort, it is error to instruct that if plaintiff has failed to prove any "damages, either actual or possible, the verdict should be for defendant." The law implies damages for every wrong.

2. RAILROADS. *Waiting-room. Expulsion of passenger. Master and servant.*

Where plaintiff, a colored woman, sues a railroad company for damages for being wrongfully and violently ejected from the waiting-room for whites, an instruction is erroneous that announces non-liability, merely if plaintiff was expelled by a peace-officer, there being certain evidence that he was acting under direction of defendant's servants, and, while so acting, used unnecessary violence.

3. SAME. *Manner of expulsion. Instruction.*

It is likewise error to instruct that if plaintiff entered and occupied the waiting-room set apart for whites she cannot recover, if a separate and suitable waiting-room was provided for colored people, since this instruction ignores the ground of complaint that she was ejected in a violent and improper manner.

4. SAME. *Separate waiting-rooms. Convenience.*

There being evidence that the waiting-room for colored people was more than one hundred yards from the station proper, an instruction that denies the right of plaintiff, a colored woman, to enter the waiting-room for whites, if there was a "suitable or comfortable" waiting-room for colored people, is objectionable as ignoring the question of distance.

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Statement of the case.

FROM the circuit court of Washington county.

HON. R. W. WILLIAMSON, Judge.

Appellant, Eliza Rose, a colored woman, brought this action for damages against the Louisville, New Orleans & Texas Railway Company for forcibly ejecting her from the waiting-room for whites at Leland, Mississippi, a station on defendant's railroad. The declaration alleges that defendant failed to provide a suitable and convenient waiting-room for colored people; that plaintiff, being a passenger from Greenville to Anguilla, stations on said railroad, was compelled to change cars at Leland, and wait for the south-bound train, which was late; that, on alighting from the train, she saw no waiting-room for colored people, and, having applied to the conductor, he showed her where it was, some one hundred and twenty-five yards distant from the station proper, telling her also that she did not have time to go there and walk back, as her train would be due in two or three minutes; that the train, however, was late, and did not arrive for some time; that the night was cold and damp, and plaintiff, finding no other suitable place, and having her infant with her, went into and occupied the waiting-room for whites, whereupon, without fault on her part, she was forcibly ejected from said room by defendant's servants, or at their suggestion, and was abused and beaten.

The defendant, after demurrer overruled, pleaded not guilty, and the cause proceeded to trial. It is not deemed necessary to set out the evidence. The plaintiff introduced some testimony to support all the material allegations in the declaration. It was shown that the waiting-room for colored people was in a separate building, about one hundred and twenty-five yards from the main station and usual stopping-place of passenger-trains at Leland, and there was some testimony that it was little used, and that on the night in question it was not provided with a fire. There was evidence that plaintiff was ejected by the marshal of Leland, a peace-officer, but there was also evidence tending to show that in

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so doing he was acting at the suggestion of the employes of the defendant.

The instructions granted for defendant, which are passed on in the opinion, are as follows:

1. "The court instructs the jury that the plaintiff in this cause can only recover such damages as she has, by the evidence produced before them, shown that she has sustained; and that if plaintiff has failed to prove that she has sustained either actual or possible damages, they will find for the defendant.

3. "The court instructs the jury that the marshal of Leland was an officer of the law, and, as such, was authorized to remove plaintiff from the waiting-room provided and set apart at that place, by defendant, for white people, if they believe from the evidence that the defendant, in January, 1890, had provided and set apart separate and suitable rooms for the white and colored races at Leland, and that plaintiff was a colored woman; and that the defendant is not liable in damages because of the removal of plaintiff from the waiting-room set apart for white people by said officers, and her subsequent arrest.

4. "The court instructs the jury that although they may believe from the evidence that the defendant failed to provide suitable and convenient waiting-rooms for passengers at Leland, the plaintiff cannot recover damages therefor beyond or more than they believe she has shown by the evidence that she has sustained; and that, if plaintiff has failed to prove that she has sustained damages, they will find for the defendant, unless they believe from the evidence she is entitled to punitory damages.

5. "The court instructs the jury that, although they may believe from the evidence that the waiting-room at Leland provided and set apart by the defendant for colored people, was not as convenient as that provided for white people, yet, that they did not authorize plaintiff to enter and occupy the waiting-room set apart at that place by defendant for white

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Statement of the case.

people; and, if they believe from the evidence that a suitable waiting-room was provided by defendant for colored people, and that plaintiff entered and occupied that one set apart for white people, they will find for the defendant."

For the plaintiff, court gave, among other instructions, the following, the words in italics being modifications by the court:

"The court instructs the jury, at the request of the plaintiff, that if they believe from the evidence that the plaintiff was a passenger on defendant's train from Greenville, Miss., to Anguilla, Miss., and had paid the amount of fare charged and demanded by defendant, and that she was carried by defendant to Leland, and that defendant's trains were so run that plaintiff had to change cars at Leland to go to Anguilla, and that defendant's south-bound trains on the main line did not so connect so as plaintiff could pass immediately from one train to another, without waiting for said south-bound train on the main line, and that plaintiff was compelled to wait at Leland for said train on the main line, and that defendant's train usually stopped at the hotel for passengers to get off and on said train, and that plaintiff was informed by the conductor of defendant that she did not have time to go up to the upper depot, and return, in time to get on said south-bound train on the main line, and that defendant did not have a suitable *and comfortable* waiting-room for colored passengers at or near enough to the place where the train on said main line stopped for passengers, and that there was no suitable *or comfortable waiting*-room for colored people in which plaintiff could wait for said train, and that by reason of such failure of defendant to furnish *such* waiting-room for plaintiff and other colored passengers, plaintiff was compelled to wait out in the weather with her child, they ought to find for plaintiff, and assess such damages as they believe, from all the circumstances and facts *in evidence*, she is entitled to, not to exceed twenty-five hundred dollars."

The trial resulted in a verdict for the defendant. Judg-

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ment accordingly, and, after motion for new trial overruled, plaintiff appeals.

G. W. Thomas, for appellant.

Plaintiff's first instruction was complete before modification, and it was error to modify it.

The first instruction given for the defendant is misleading, and the second and third are upon the weight of evidence.

Mayes & Harris, for appellee.

The modification of plaintiff's first instruction by inserting the words "or comfortable waiting-room," was a modification of a clause which should have been stricken out altogether. It is not denied that there was a separate waiting-room for colored people, and that plaintiff knew where is was. The only controversy was about its remoteness from the usual stopping-place, and, in an incidental way, about its comfort. All of this is sufficiently and fully adverted to in the preceding part of the instruction. As the plaintiff was not entitled to the instruction as written, she cannot complain that the court modified it.

There is no error in the instructions for defendant. Counsel for appellant, in his brief, does not suggest why or how they are erroneous. The whole inquiry before the jury was one of fact. Under full instructions, the jury has found for the defendant, and the verdict should not be disturbed.

CAMPBELL, C. J., delivered the opinion of the court.

We would affirm this judgment but for erroneous instructions for the defendant. The first contains the erroneous proposition that it was necessary for the plaintiff to prove that she had sustained damages. Not so. The law implies damages for every wrong. The third instruction announces non-liability of the defendant, if the plaintiff was ejected from the waiting-room by an officer, without regard to the inquiry whether the officer acted under the direction of the

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servant of the defendant, and in what manner the removal was effected. The fourth is subject to the vice of the first. The fifth is objectionable, in that it directs a verdict for the defendant without reference to the manner of plaintiff's ejection from the waiting-room for whites. The right to eject should be exercised in a proper way, and that this was not done was one of the matters in dispute.

The second modification by the court of the first instruction for the plaintiff by the words "or comfortable waiting," as applied to the waiting-room for colored people, is subject to the criticism that it ignores distance, and had better be avoided on another trial.

Reversed and remanded.

MOBILE & OHIO RAILROAD CO. *v.* W. W. MULLINS ET AL.

INSTRUCTION. *Contributory negligence. Question for jury.*

In an action against a railroad company for damage to horses transported, where the question is the alleged contributory negligence of plaintiffs, in failing to feed the horses at a certain station, whereby, it is claimed, they became weak and more subject to injury, it is error to charge, as matter of law, that plaintiffs were not negligent as to this, if they were informed by an employe of defendant that the cars containing the horses would not be delayed at such station. In such case, the question of contributory negligence is one of fact for the jury.

FROM the circuit court of Monroe county.

HON. LOCK E. HOUSTON, Judge.

Appellees sued the Mobile & Ohio Railroad Company for damages alleged to have been sustained by them, by reason of a breach of contract on the part of defendant in transporting two car-loads of horses from Meridian to Aberdeen, Miss. The horses were shipped from San Antonio, Texas, to Aberdeen, and the contract of through shipment, made with

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Statement of the case.

the Galveston, Harrisburg & San Antonio Railroad Company, was made a part of the declaration, and introduced in evidence. Under the terms of the contract, one of the plaintiffs for each of the cars was transported without additional charge, and it was stipulated that they should take care of and water and feed the stock along the route. The horses were fed and watered at New Orleans. From that point to Aberdeen it was about twenty-two hours' run, and it was shown that the stock could very well go that long without being fed and watered. The cars reached Meridian, and came into possession of defendant about eight o'clock in the morning. The testimony for plaintiffs tended to show that all the horses, except one, were then in apparently good condition, and that the train-dispatcher of the defendant informed plaintiffs that the cars would be promptly forwarded on the way to Aberdeen at nine o'clock, but they did not leave Meridian until about half-past two o'clock in the afternoon. The horses were not fed and watered at Meridian. The plaintiffs testified that this was not done because they were momentarily expecting the cars to leave.

When the horses reached Aberdeen, it was shown that they were bruised and injured, and in a bad condition generally. Plaintiffs claimed that this was due to the negligence and mismanagement of the defendant in transporting the stock. On behalf of defendant, it was claimed that the failure of plaintiffs to feed and water the horses at Meridian rendered them weaker and more liable to injury during the remainder of the journey, which was about 126 miles.

From this statement, it will be seen that the failure to feed and water the stock at Meridian became a material fact in the determination of the case. The questions of fact involving the defendant's liability were controverted in the evidence. Among other things, at the instance of plaintiffs, the following instruction was given:

2. "The court charges the jury that if they believe from the evidence that the train-dispatcher or engineer of the

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Opinion of the court.

Mobile and Ohio Railroad told plaintiffs, or either of them, at Meridian, Mississippi, that their stock-cars would leave Meridian at 9 A.M., then it was not negligence in plaintiffs not to feed at Meridian."

Verdict and judgment for plaintiffs. Motion for new trial overruled. Defendant appeals. In view of the opinion, it is not necessary to make any further statement of the case.

Sykes & Bristow, for appellant.

Under the contract, it was the duty of plaintiffs to feed and water the stock at Meridian. The alleged statement of the train-dispatcher, to the effect that the cars would leave there at nine o'clock, did not excuse them from doing this, especially as the cars remained at Meridian about six hours after that time. It was plainly error for the court to instruct, as a matter of law, that the plaintiffs were not negligent as to this.

Clifton & Eckford, for appellees.

The evidence shows that the animals were injured by the mismanagement and negligence of defendant in switching and handling the cars at Meridian, and after leaving there.

Plaintiffs' second instruction was properly given because of the statement of the train-dispatcher that the cars would be promptly forwarded at nine o'clock. Before defendant should be permitted to set up contributory negligence in the failure to feed and water the stock, it should be shown that its employes notified plaintiffs of the probable delay at Meridian. It was necessary for plaintiffs to be constantly in readiness to leave there. For this reason, the horses were not unloaded for food and water. The fact that it finally turned out that there was ample time for this, does not affect the question.

CAMPBELL, C. J., delivered the opinion of the court.

Without further remark, we will reverse the judgment because of the second instruction for the plaintiffs, which, in-

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stead of leaving to the jury to determine as to failure to feed at Meridian, announces as a legal proposition that negligence is not predicable of that. It is a question of fact, as to which the law has no view.

Reversed and remanded.

W. J. CONRAD *v.* THE STATE.

1. LOCAL OPTION LAW. *Laws* 1886, *p.* 35. *Result of election. Evidence.*

   By § 4 of the act of 1886 (Laws, p. 35), it is the duty of the election commissioners to canvass the returns of a local option election and declare the result. Their report is made evidence, and it is the sole evidence of the result, and cannot be questioned in a collateral attack. *McDonald* v. *State*, 68 Miss., 728.

2. SAME. *Report of commissioners. Collateral attack. Criminal law.*

   The rule forbidding investigation, on a collateral inquiry, as to the sufficiency of the evidence on which such report was made, applies as well in criminal as in civil cases. Hence, on the trial of one indicted for the unlawful sale of liquor in a county where such election has been held, the report of the commissioners is conclusive as to the result.

3. SAME. *Result of election. Report conclusive. Irregularities.*

   In such case, where the report avers that the election resulted against the sale, it is conclusive as to that, although showing on its face that no election was held in some of the precincts of the county, and, as to another, that no returns were received by the commissioners.

4. RESULT OF ELECTION. *Judicial notice. Code* 1892, § 1621. *Prior offense.*

   On the trial of such a case, the court will, under § 1621, code 1892, take judicial notice of the result of the election, although held under the act of 1886, and though the offense was committed before said section of the code became operative. The act being unlawful, whether the election resulted for or against the sale, the defendant's guilt or innocence is not involved in a decision of the question as to how the election resulted.

FROM the circuit court of Yazoo county.
HON. J. B. CHRISMAN, Judge.

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Brief for appellant.

On August 25, 1892, appellant was indicted in the circuit court of Yazoo county, for the unlawful sale of liquor on August 23, 1892, the county having voted against the sale of liquor at an election held under the local option law in August, 1888. He was convicted in February, 1893, and sentenced to imprisonment in the county jail for sixty days, and to pay a fine of $100.

On the trial, it was shown that the defendant sold liquor in said county in May, 1892. Thereupon the defendant offered to introduce the report of the commissioners made to the board of supervisors in respect to the election held in said county under the local option, August 23, 1888, with a view to showing the insufficiency of the returns upon which the commissioners of election made their report that a majority of votes against the sale of liquor had been cast. No evidence *aliunde* was offered, but it was proposed to be shown by the statement of the returns contained in the report itself that the result had been improperly declared. The report contained a statement showing the number of votes cast at each of eleven precincts, showing a majority of seven hundred and four against the sale. But it was stated therein that no election was held at one precinct, and that no returns were received from two others. The maximum fine for the first offense, under the act of 1886, is $50. The opinion contains a further statement of the case.

J. S. Perrin and *Barnett & Thompson*, for appellant.

1. The offense with which appellant was charged was committed before the code of 1892 had gone into effect, and before the act of 1886 was superseded. Therefore, the penalty was fixed by the act of 1886, and it goes without saying that the fine of $100 was excessive. We assume, in any event, the case will be remanded, in accordance with § 4353, code 1892, that appellant may be properly sentenced.

2. In *McDonald* v. *State*, 68 Miss., 728, this court said the commissioners' return was made the evidence of the result of

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Brief for appellant.

the election, and is the only admissible evidence on the subject. Now, the return offered in this case is a *partial* one. That it is a partial canvass of the votes cast at the election, is affirmatively shown. We are aware of the rule that, in civil contests over offices, and the like, in case of a partial return like this, the return is considered *prima facie correct*, and that the burden of proving that the omitted votes were sufficient in number to change the result, is thrown on the contestant; but that rule has no application. In the first place, it is not a question where the burden of proof rests, for, under the case above cited, no extraneous proof is admissible. In the next place, if it were a question of the burden of proof, this being a criminal case, the burden would be on the state, from which it never shifts. The argument is, not that the election was void, but that the return was insufficient to show what the result was. The court cannot, as a matter of law, know how many voters there may have been at the three omitted boxes. If it did, the result would be the same, for the return is the only evidence.

It may be said that, inasmuch as the return shows that it was made the day when the managers were directed to deliver the returns to the commissioners, it will be presumed that they waited until the prescribed time, and then did the best they could by making the return upon such reports as had been delivered to them. But this will not meet the difficulty, for the question is not solely as to the duty of the commissioners, but as to the evidential value of their return. The duty of the managers of election to report the votes cast at the boxes which were omitted, was purely ministerial, and they could have been compelled to perform it by mandamus. *Myers* v. *Chalmers*, 60 Miss., 772; McCrary on Elections, § 338.

It was necessary that all the votes cast should have been considered by the canvassers and a statement procured by them in some way, before their return could be received as sufficient evidence as to the result of the election.

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Brief for the state.

We submit that no argument can render this return competent, under the statute, for the competency of the return is the same thing as its weight. It must be complete in itself and conclusive in itself.

This is not an attempt to attack the return collaterally by evidence *aliunde*, or to go behind the return and show it to be untrue. The proposition is to reject the return as evidence, because its value as such is destroyed by its own statements.

The rule against collateral attack should have no application to this case, because no method is provided to contest the result of a local option election by any direct proceeding. *Schulherr* v. *Bordeaux*, 64 Miss., 59.

A majority of the commissioners may declare the result. *Fullwood* v. *State*, 67 Miss., 554. And that majority may be of the same opinion as to the question to be voted on. Code 1892, § 1611. This leaves the commissioners masters of the situation, amenable to no authority, with no remedy for any wrong they may commit. Under the ruling of the lower court, they, or a majority of them, on any excuse to be expressed in their return, may count only the votes cast at such boxes as they may select, and declare the result from them, and thus defeat the will of the voters with impunity.

Frank Johnston, attorney-general, for the state.

1. The court properly instructed the jury that the local option law was in force in Yazoo county. Code 1892, § 1621. This statute is merely a rule of evidence, relating not to the issue whether defendant committed the act, but to a preliminary matter which determined simply the question as to which of the two statutes was in force.

The contention of appellant must proceed upon the theory that the statute of 1892, in force at the time of the trial, is *ex post facto*. The offense was committed in May, 1892. Whether the law of 1886 or the code of 1880 was in force at that time, is wholly immaterial, so far as the criminality

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of the act is concerned. The new law did not change the rules of evidence in respect to the legality of the act. A statute providing different evidence, or a less degree of evidence, for conviction, cannot be made retroactive. But here the act of defendant was *per se* criminal. The essential evidence required to prove the offense is the same, whether it comes within the act of 1886 or the code of 1880. For these reasons § 1621, code 1892, is not an *ex post facto* law.

2. But the proof showed that the county had voted to prohibit the sale of liquors. The law of 1886 makes the report of the commissioners evidence of the result of the election.

The objections to the validity of the election are untenable. The failure of one or more precincts to hold an election, could not defeat the result in the county. The same may be said of the objection that the returns from one precinct were never sent in.

The admission of opposite counsel that, in a civil case, the election would be valid, concedes the whole question. There is but one rule as to the validity of the election. If valid for one purpose, it is valid for all.

Again, the validity of the election could not be attacked in this collateral manner. The power is vested in the commissioners to canvass the returns and decide the result of the election. The question is settled in *McDonald* v. *State*, 68 Miss., 728.

3. If the statute of 1886 is the law of the case, and fixes the punishment, then the fine of one hundred dollars is excessive. In this view the court will not disturb the verdict, but will remand the case for the proper sentence.

Argued orally by *Frank Johnston*, attorney-general, for the state.

COOPER, J., delivered the opinion of the court.

The court properly instructed the jury that the act approved March 11, 1886, and commonly known as the local option law, was operative in Yazoo county at the date of the

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alleged illegal sale of intoxicating liquors by the defendant. If, since the code of 1892 became operative (by § 1621 of which the courts are required to take judicial notice of the result of local option laws), it is admissible for one indicted to traverse the allegation that the act is in effect in the locality, the evidence introduced in the court below was conclusive.

By § 4 of the act, it is made the duty of the commissioners of election to canvass the returns and declare the result of elections held under the provisions of the law, and copies of their report are made evidence in all courts of this state. In *McDonald* v. *State*, 68 Miss., 728, we held this return of the commissioners to be the only evidence admissible of the result of such elections. The rule which forbids an investigation, on a collateral inquiry, into the sufficiency of the evidence upon which the commissioners made their report, has no exception from the mere fact that the collateral attack is made in a criminal prosecution.

The sale of intoxicating liquor by the defendant was, in its nature, an offense, irrespective of the question whether the election was in favor of or against the operation of the law. The inquiry as to his guilt or innocence was not involved in or determinable in any degree by its decision. Paine on Elections, § 951.

In cases of contested elections, where the right of one claiming title to an office under a certificate of the returning officers, is directly involved, irregularities upon the face of the certificate may impair or destroy its value as *prima facie* evidence. McCrary on Elections, § 279. But the return cannot be attacked collaterally. *Ib.*, § 281.

It is conceded that the sentence imposed, as it appears in the record (probably by clerical error), is greater than the maximum prescribed by law. For this error, the judgment must be reversed. The verdict, however, will not be disturbed, but the appellant will be held to appear at the next term of the circuit court of Yazoo county for sentence.

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Brief for the state.

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S. RAWLS v. THE STATE.

1. INDICTMENT. *Statutory offense. Averments. Words of statute.*
Where the language of a criminal statute is broader than its purpose, and, under certain circumstances, it may be lawful to do the thing forbidden by the words, if taken literally, it is not sufficient to indict in the statutory language. The indictment must charge, in apt language, the facts which make the act unlawful. *Sullivan* v. *State*, 67 Miss., 346.

2. SAME. *Keeping gaming-table. Averring unlawful act. Code* 1892, § 1124.
By § 1124, code 1892, which forbids keeping or exhibiting certain gaming-tables or banks, it was not intended to make criminal the mere act of keeping or exhibiting these. The object was to prevent gambling, and, in an indictment under the statute, the unlawful purpose of keeping a gaming-table or bank must be alleged; the facts must be stated which make the keeping or exhibiting unlawful.

FROM the circuit court of the first district of Hinds county.
HON. J. B. CHRISMAN, Judge.

Appellant was convicted in the court below. He made a motion in arrest of judgment, on the ground that the indictment was in the alternative, and that it charged no offense, which motion was overruled. Hence this appeal. The opinion contains a further statement of the case.

Calhoon & Green, for appellant.

The indictment charges no offense. It does not aver that there was any betting at the table or bank. The fact that there is a legal definition of a crime, does not dispense with the necessity of charging in an indictment the facts constituting the offense.

Frank Johnston, attorney-general, for the state.

The objection to the indictment, that it does not charge that there was any betting at the table, was not made in the motion to arrest the judgment, and therefore cannot be con-

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sidered. But, even if the point were made, it is not well taken. Section 1124, code 1892, does not contain the words "betting" or "gambling." The words "gaming" and "gaming-tables" are the terms employed. The indictment follows the language of the statute, which evidently uses the words gaming or gaming-tables as synonymous with gambling or gambling-tables. It cannot be supposed that the statute intended to make the keeping of a room for playing at cards for amusement a misdemeanor. It means "gambling" by the word gaming, and "gambling-table" by the words gaming-table or bank. Any other construction would make the statute include an act innocent and harmless.

The term "gaming" is similar in significance to the word gambling in its *legal* acceptance. Bishop on Stat. Crimes, §§ 857, 858. There are some exceptions, but I have stated the general rule, and the case at bar does not fall within any of the exceptions.

The statute does not embrace the misdemeanor of gambling as to the participants, but is aimed at the person who keeps the bank or gaming-tables.

Argued orally by *S. S. Calhoon*, for appellant, and *Frank Johnston*, attorney-general, for the state.

WOODS, J., delivered the opinion of the court.

The indictment charges that the defendant did unlawfully "keep and exhibit certain gaming-table, commonly called *polker*-table or bank, at which gaming-table or bank so unlawfully kept or played or exhibited certain games of cards and dice, the names being to your grand jurors now unknown, for money, contrary to the forms of the statute," etc. It is apparent that the indictment does no more than charge, in the words of the statute, the keeping and exhibiting of a gaming-table. The purpose for which it was kept, the use to which it was put, is not stated. It is evident, we think, that the pleader designed to charge that the gaming-table was

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kept and exhibited for use by persons desiring to gamble, to bet money or other things of value; but it is plainly evident that the design of the pleader was not executed. The indictment should have enumerated the acts done by the accused which rendered the keeping of the gaming-table unlawful. "The language of the statute is broader than its purpose," to quote the felicitous expression of Cooper, J., in the case of *Sullivan* v. *The State*, 67 Miss., 346. It was not the purpose of the statute to make criminal the mere keeping in one's house a gaming-table, or the keeping of a gaming-table to be played at or upon for amusement only. The object to be accomplished was the prevention of gambling, by imposing punishments on those who promoted that evil by providing the means for its indulgence. "Where, under certain circumstances, one may lawfully do the thing forbidden by the literal meaning of the words of the statute, it is not sufficient to indict by the use only of the statutory words. Under such circumstances, the indictment must charge, in apt language, the unlawful act, that the defendant may be advised of the nature and character of the offense with which he is charged, and that he may, by demurrer, take the opinion of the court whether the facts charged constitute an offense," as was said by this court in the case referred to.

The indictment is fatally defective, in that it does not state the facts which made the keeping of the gaming-table unlawful, and the motion in arrest of judgment should have been sustained.

The judgment of the court below is reversed, the motion in arrest sustained, the indictment quashed, the case remanded and the accused held to answer any other indictment that may be preferred.

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Syllabus.

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PRICE CHISM v. THE STATE.

1. EVIDENCE. *Discrediting one's own witness. Adverse testimony. Surprise.*

It is only where the testimony of a witness is *adverse* to the party calling him, and such party shows that he is surprised by his testimony, having had reasonable ground to believe he would testify in his favor, that such party is allowed to discredit the witness by proof of contradictory statements. The rule cannot be invoked if the witness does not testify adversely, but merely denies knowledge of the case. *Dunlap* v. *Richardson*, 63 Miss., 447.

2. SAME. *Murder trial. Witness denying knowledge. Former statements.*

Accordingly, where a witness called by the state in a murder trial denies all knowledge of the homicide, the prosecution is not justified in attempting to discredit him by an examination, in which it is shown that he had previously made a different statement, and had testified favorably to the state before the grand jury.

3. INCOMPETENT EVIDENCE. *Admission of. Error not cured.*

Error in permitting, over objection, such examination, which elicits statements of the witness tending to show his and defendant's responsibility for the murder, and to negative the defense of an *alibi*, set up by the accused, is not cured by immediately afterwards excluding such statements at the suggestion of the state, and instructing the jury not to consider them unless it can be positively affirmed that the accused was not prejudiced.

4. SAME. *Admitting incompetent evidence. Error. New trial.*

When incompetent evidence of great import is deliberately introduced, and it cannot be said with confidence that no other conclusion than that of guilty could have been reached on the legal evidence, the fact that the jury was subsequently instructed to disregard the incompetent testimony, will not cure the error, and for this a new trial will be granted.

FROM the circuit court of Union county.

HON. EUGENE JOHNSON, Judge.

Appellant was convicted of the murder of one Brice Adair. The opinion states the case.

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Brief for appellant.

Mitchell & Blair, for appellant,

Filed a lengthy brief discussing different assignments of error, and, as to the questions passed upon by the court, making the following points:

1. It is common learning that the acts and declarations of a conspirator are not admissible against a co-conspirator after the execution of the conspiracy. This rule was violated in this case repeatedly. For a single violation, the judgment was reversed in the case of *Simmons* v. *State*, 61 Miss., 243.

2. We desire to call the attention of the court, in particular, to one violation of a rule of evidence in this case. As to the body of Luke Chism having been carried home, the witness, Tom Prather, was improperly allowed to state that John Palmer called him out and told him if he repeated what he had said he would kill him. The same objection applies to the acts and declarations of Aiken, Bulus Prather and others. In no view was this admissible.

3. The error relating to the examination of D. R. Cox is so gross, and shows such a plain violation of every fair and just mode of examining witnesses and conducting a prosecution, that we think it hardly necessary to argue it. Sometimes a party is allowed to impeach his own witnesses, but there must be a foundation for it. *Moore* v. *Railroad Co.*, 59 Miss., 243; *Dunlap* v. *Richardson*, 63 *Ib.*, 447.

The court allowed counsel for the state to introduce and reject testimony arbitrarily, to suit their fancy. The objections of the defense were overruled, and then, in some instances, after the testimony had worked its ruinous effect on the minds of the jury, it was excluded by the court on the mere suggestion of the state's counsel. The record does not contain even a suggestion that counsel for the state was misled. After being permitted to lay the foundation to contradict, they not only made no effort to do so, but suggested that the testimony be excluded, thus, it seems to us, confessing that the real purpose was not to contradict, but to prejudice the jury against the witnesses and the defendant. The

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Brief for the state.

real question here is, not whether such examination can be allowed for the purpose of contradicting where counsel calling the witness has been misled, but whether it may be done for *effect*, when there is nothing to show that counsel had been entrapped. It will be observed that contradiction was not pretended or sought for in several of the questions.

4. The different rulings on the question as to the examination of witnesses, and the admissibility of testimony, were exceedingly important to the appellant. No conclusive case was made against him. In a moment of great excitement, in the night, Mrs. Adair and her son claim that they recognized appellant, though they say he was covered from head to foot. It is morally certain that, even under ordinary circumstances, this could not have been done. Mrs. Adair claims that she recognized the parties from their peculiar motions, and Luther Adair says he recognized them from their voices and motions. Neither explains the peculiar motions. As the evidence of identity is so unsatisfactory, and the charge against appellant is so dependent upon circumstantial testimony, the admission of incompetent testimony and the improper conduct of the case became matters of vital importance to the accused. It looks very much to us like the verdict is contrary to the evidence. If it was about balanced, and not entirely satisfactory, almost any error may have turned the scales against the defendant.

J. D. Fontaine, on the same side.

Frank Johnston, attorney-general, for the state.

It is objected that it was error to permit Thomas Prather to testify that John Palmer and others brought Luke Chism to his house on the night of the homicide, and, further, that John Palmer threatened to kill him if he disclosed the fact. It is argued that this testimony is inadmissible, for the reason that the declarations of the conspirators, made after the crime, are incompetent. This cannot be classed as declara-

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Brief for the state.

tions or conduct after the accomplishment of the conspiracy. The acts and declarations of the conspirators in carrying Luke Chism to his home, and attempting to conceal the evidence of their crime, and to suppress the testimony of Prather and wife, are part of the *res gestæ*. The scene at Luke Chism's house immediately after the killing was but the sequel to the crime. The conspirators did not separate, and were engaged in a common design of concealing their crime.

These persons, by aiding Luke Chism in suppressing evidence of the crime, were accessories after the fact. The second crime followed fast upon the first, and was its logical sequel.

The threat made by Palmer to the witness, Prather, was not a declaration of a conspirator after the abandonment of the crime. The conspirators were then engaged in the common design of *concealing their crime* by getting Luke Chism away from the scene of the homicide, and in concealing the fact that he had been shot at Adair's house. Whatever was done or said by any of the parties at Luke Chism's house in furtherance of the common design was admissible and within the elementary rule. The conduct of Palmer in threatening Prather was a verbal act in the common design of concealing the crime. *Read* v. *State*, 20 Ga., 681. This was not a declaration of the conspirator, Palmer, in regard to the facts of the crime, but it was a verbal act contemporaneous with and forming a part of the design to efface the evidence of the crime, a purpose in which the accused was then engaged.

Finally, I submit that the conduct of Palmer, testified to by Prather, who testified to the same conduct on the part of the accused in attempting to suppress testimony, was immaterial, and did not prejudice the defendant. If the witness was believed, then it was true that the accused threatened him in case of disclosure, and the point was no stronger against him that somebody else did the same thing. The court will not reverse for non-prejudicial error. 3 Smed. & M., 42; 12 *Ib.*, 161; *College* v. *McIntosh*, 37 Miss., 671.

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Opinion of the court.

But the evidence was perfectly competent as part of the *res gestæ*. *Browning* v. *State*, 30 Miss., 656. The principle of that case clearly embraces the acts and declaration of the conspirators while engaged in a common design of concealing evidence of the crime immediately after its commission.

There are two answers to the objection in respect to the questions propounded to the witness, D. R. Cox. In the first place, the questions were not improper. In the next place, the court, immediately after permitting the questions to be asked, excluded the testimony.

It is competent for a party to prove that a witness whom he has called, and whose testimony is unfavorable, had previously made a different statement. 1 Greenleaf's Ev., §§ 44, 44*a* and note. *Melhuish* v. *Collier*, 15 Q. B., 878.

It is manifest, from the admission of the witness, that the state's attorney was taken by surprise. The witness had been before the grand jury, where he had testified to material facts for the state. The district attorney had a right to presume that he would again testify to these facts. It was not necessary for him to inform the court that he was surprised; that he was surprised manifestly appears. The witness was not impeached, either by assailment of his general character or by independent proof that he had made different statements. His former statements were not to be taken as independent testimony, nor did he stand as impeached in general character.

But there was nothing prejudicial in the action of the court, for it immediately excluded the questions and answers. It is impossible to perceive how the defendant was prejudiced in the slightest degree.

On the whole case, I confidently submit that justice has been done; that the verdict is abundantly sustained by the evidence, and that there is little or no reason to believe that a different result would ensue upon a second trial.

COOPER, J., delivered the opinion of the court.

On the night of July 7, 1892, at about one or two o'clock,

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a party of six or more men appeared at the residence of Brice Adair. They surrounded the house and demanded admittance, saying they were officers of the law with a warrant for the arrest of Luther Adair, a son of Brice Adair. Brice and Luther Adair, suspecting the purpose of the men, refused to open the door, and seized their arms. The front door was broken open by two of the men, who were enveloped in a white covering, and wore white cloth masks upon their faces which wholly concealed their features. Immediately one of them struck a match, which failed to burn. The other one then struck another, and at the same instant his companion fired upon Brice Adair, inflicting a fatal wound, from which he soon afterwards died. The murderer instantly fired again, missing his victim. Luther Adair, about this time, fired upon the other man, who staggered back and fell, rose to his feet, and fell again, and was then carried from the premises by his companions, who soon afterwards retreated from the scene.

The neighbors were soon informed of the horrible occurrence, and many of them appeared at the residence of Adair. A search of the premises discovered a loaded and cocked pistol, dropped by some one of the assailants, and a bloody mask, with a bullet hole on the part of it which would be over the left side of the chin of one wearing the mask. A pool of blood was found at the spot where the man fired on by Luther Adair first fell, and another at the place where he fell the second time. Spots of blood were found along the route the retreating party had followed. The tracks of the horses along the road were also followed a mile or two, and in the direction of the residence of Luke Chism, a brother of the defendant.

At three o'clock that night, Dr. Murray, a physician, residing a few miles from the residence of Luke Chism, was called to attend him, by one Bulus Prather, who is also indicted as a participant in the murder of Adair. On arriving at the residence of Luke Chism, Dr. Murray found him suf-

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fering from a gunshot wound on the left side of the chin, the bullet having ranged around the neck, and lodged in the muscles behind, from which it was extracted by Dr. Murray, who preserved it, and it, with the rifle of Adair, was presented to the jury on the trial of the case, and it is said that the size of the ball was of the caliber of the gun. No explanation was made to Dr. Murray of the circumstances under which Luke Chism was wounded. The pistol found in Adair's yard was identified by its owner, who testified that he had lent it to Luke Chism the day preceding the homicide.

The widow of Brice Adair, and his son Luther, were examined as witnesses on the part of the state, and testified that, although the two men who broke open the door were masked, they recognized them as Luke and Price Chism by the outlines of their forms, their carriage and their voices, though they attempted to disguise their voices, but, in the excitement of the moment, failed to uniformly speak in a disguised tone.

Thomas Prather and Eugenia, his wife, were introduced by the state, and testified that, at the time of the killing, they were living at the home of Luke Chism; that, on the night of the homicide, they were awakened by the screams of Mrs. Chism, and, upon going out of their room, they saw John Palmer, Bulus Prather, Ulysses Hamblin and the appellant, Price Chism, bringing into the house Luke Chism, who was then wounded in the chin; that these parties excluded the witnesses from the room.

Over the objection of the defendant, the witness, Thomas Prather, was allowed to state that John Palmer took him aside, and warned him not to speak to any one of what they had seen. Both Prather and his wife testified that the defendant gave them like warnings. These two witnesses, on cross-examination, confessed that they had perjured themselves before the committing magistrate and the grand jury. That, being examined before the magistrate and the grand

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jury, they had stated that they were awakened by a gun-shot, and, upon going into the yard, found Luke Chism lying near the corner of his house, and that Bulus Prather and the witness, Thomas Prather, had carried him into the house.

One D. R. Cox was placed on the stand, as a witness for the state, and testified that he knew nothing of the killing of Adair. The prosecuting attorney then stated to the court that he desired to contradict the witness, and, to this end, proposed to ask him certain questions. The court then directed the jury to be withdrawn, and, this being done, the witness was asked the following questions:

"(1) Did you not, at the August term, 1892, of the court, state to the grand jury that Price Chism asked you to go with him to whip Luther Adair, and that you, Price Chism, and others went to Brice Adair's house, on the night he was killed, to whip Luther Adair, and, while there, that Luke Chism was shot, and Price Chism killed Brice Adair? (2) Did you not state to the grand jury at said term that, on the night Brice Adair was killed, you, Price Chism, Luke Chism, Fayette Chism, John Palmer, Frank Palmer, Bill Aiken, Bulus Prather, and Ulysses Hamblin and others, met at Mt. Zion church to talk and arrange about going to whip Luther Adair? that you objected to going, and the others threatened to whip you if you did not go? (3) After going before the grand jury, did you not leave, and go to the state of Arkansas, and were you not furnished money by Mrs. Luke Chism; and, while in Arkansas, did you not write to Governor Stone, and say to him that you were guilty, and, if so, what were the contents of that letter? (4) Were you not arrested and brought back here, and are you not now in jail? And did you not send for Mr. Stevens to come to see you in jail, and say to him there that you wanted to make a full statement, and say to him the same you had stated to the grand jury?"

The defendant objected to the questions being propounded to the witness in the presence of the jury, or to his being

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permitted to reply thereto, which objections the court overruled, whereupon the jury was brought into court, and the counsel for the state, over the objection of the defendant, was permitted to propound said questions to the witness, who, over like objections, was permitted to answer, and said: (1) That he did make the statement inquired of in the first question to the grand jury, but did so to escape punishment. (2) That he did make the statement inquired of in the second question, but did so through fear, and on a promise of protection. (3) That he did leave the state, and go to Arkansas; did not say Mrs. Chism furnished him money; did not write to Governor Stone, but his uncle, to whom he went in Arkansas, did write a letter. (4) To the fourth question, he replied that he was not arrested, but was brought back to the state, and was now in jail; did send for Mr. Stevens to come to the jail, and did say to him he wanted to make a full statement, and did repeat to him the statements he had made before the grand jury, but did this because he was afraid, and had been promised protection.

The counsel for the state then proposed to read, in evidence, the letter referred to by the witness, which was objected to by the defendant, and the objection was overruled, but the state's attorney then declined to introduce it. The bill of exceptions states that after the witness had answered the questions propounded to him, and the defendant excepted thereto, "that counsel for the state then agreed that said testimony might be excluded; whereupon the court remarked, 'Then, it may be excluded;' when counsel for the defendant asked the court what part of the testimony was excluded, to which the court replied, 'Any part of it, or all of it;' and the jury was instructed by the court to disregard said testimony."

The defense sought to be established by the evidence introduced consisted of an *alibi*, which was supported principally by the family of the defendant, or the relatives of those who were also under indictment for the murder of Adair.

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Several of the witnesses who reached the house of Adair soon after his murder, testified that both Mrs. Adair and Luther Adair then stated that they did not know who did the killing, as the parties were masked, and could not be recognized. The state, in turn, introduced a number of persons who contradicted the witnesses for the defense by testifying that, soon after the occurrence, they had stated that Mrs. Adair and Luther had immediately declared Luke and Price Chism to have been the men who broke open their door and shot Brice Adair.

It is at once apparent, from the foregoing statement of the case, that the only question worthy of serious consideration by the jury was whether Price Chism was, in fact, one of the party by whom the murder was committed.

If we could say with confidence that no other conclusion could be arrived at by the jury on the competent evidence introduced, it would be our duty to affirm the judgment, regardless of any minor errors that may have been committed on the trial. We should not consider mere inaccuracies in the instructions of the court, or errors in the admission of fragments of incompetent testimony. But the crucial question was, was the appellant one of the murderous crowd of lawless men who appeared at the residence of Brice Adair and barbarously put him to death? And on this vital question the court below admitted grossly incompetent and material evidence. It is difficult to characterize, within the limits of judicial expression, the flagrant disregard by the trial court, not only of the principles governing the production of testimony, as formulated by the approved text-writers, but of the direct and positive decisions of this court.

The course pursued in the examination of the witness, Cox, is fatal to the conviction secured by the state. The verdict must be vacated, if the security of an impartial trial on competent evidence is to be preserved to one accused, it may be unjustly, of crime. No reputable writer, no court of authority has ever, in any age, given support or countenance

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to such evidence. Mr. Greenleaf, in his work on Evidence, with great brevity and precision, notes the rule, with its proper limitations, under which a party introducing a witness may attack his credibility by proving previous contradictory statements by him. He says: "Whether it be competent for a party to prove that a witness whom he has called, and whose testimony is unfavorable to his cause, had previously stated the facts in a different manner, is a question upon which there exists some diversity of opinion. On the one hand, it is urged that a party is not to be sacrificed to his witness; that he is not represented by him, nor identified with him; and that he ought not to be entrapped by the acts of a designing man, perhaps in the interest of the adversary. On the other hand, it is said that to admit such proof would be to enable the party to get the naked declaration of a witness before the jury, operating in fact as independent evidence, and this, too, even where the declarations were made out of court, by collusion, for the purpose of being thus introduced. But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify, or, that the witness has recently been brought under the influence of the other party, and has deceived the party calling him. For, it is said, this course is necessary for his protection against the contrivance of an artful witness, and that the danger of its being regarded as substantive evidence is no greater in such case than it is when the contradictory declarations are proved by the adverse party." 1 Greenleaf on Evidence, § 444.

The mere statement of the rule, in any form in which it may be expressed, it would seem, should serve as a guide to the circumstances of its application. The first and essential thing is, that the testimony of the witness must be adverse to the cause of the party by whom he is called; and the second is, that the party is surprised by such evidence, hav-

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ing had reasonable grounds to believe that the witness would testify in his favor.

Under no possible view can it be said that the witness, Cox, testified unfavorably to the state. He stated no fact tending to prove that the defendant, Chism, was not guilty of the murder of Adair. He only asserted that he, the witness, had no knowledge upon the subject of the killing.

We do not hesitate to affirm that no decision of a court or opinion of an approved writer can be found to support the admissibility of such evidence as was admitted in this case. But, in two recent decisions of this court, it has been distinctly held that a witness cannot be contradicted by evidence of other and different statements made by him, unless it be shown that the party calling him was surprised by his testimony. *Moore* v. *Railroad Co.*, 59 Miss., 243; *Dunlap* v. *Richardson*, 63 *Ib.*, 447.

In the latter case it was said: "In the absence of a statute authorizing it, a party is not allowed to discredit a witness voluntarily called by him by proof of contradictory statements previously made by the witness, unless it is shown by evidence, to the satisfaction of the court, that he has been deceived or misled by fraud or artifice practiced on him by the witness."

There is an entire absence of any thing in the record tending to show surprise on the part of the state. There is not even the assurance of counsel that such was the case. But, upon the mere suggestion of the state's attorney that he wished to contradict the witness (who had testified to nothing material to the issue), the most damaging evidence was permitted to be introduced against the defendant; and, though the state's attorney had contended for its admission as competent evidence, and had manifestly secured the precise replies he expected, he withdrew the evidence on his own motion.

The whole record impresses us with the conviction that the rule permitting a party to discredit his own witness under

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exceptional circumstances was appealed to not, in fact, for the sole purpose of contradicting the witness, but to get before the jury, as substantive evidence, the contradictory statements of the witness. There is in all cases some danger that the jury may apply the discrediting testimony to the issue involved, instead of confining it to the mere question of the credibility of the witness; but this is an unavoidable danger, and can only be guarded against by proper instructions. As between such danger and the injustice of permitting a party to be sacrificed by the wiles of an unscrupulous witness, the law chooses the lesser evil. But it is not to be tolerated that a litigant who does not show himself in danger of injury, shall invoke the rule for the purpose of putting his adversary at a disadvantage. Why did the state's attorney insist upon the competency of the evidence until it was admitted and heard by the jury, and instantly consent that it might be excluded? No one can read the record, and doubt that the purpose was to prejudice the defendant by adding to the testimony of Mrs. Adair and Luther Adair in reference to the identification of the defendant as one of the crowd who committed the murder, the conduct and declarations of the state's witness, Cox.

Nor can we affirm that no injury was done the defendant by the course pursued. True, the court, after counsel for the state had consented thereto, directed the jury to disregard the evidence. But this direction did not necessarily cure the error. The question remains, did the jury disregard it? Can the court confidently affirm that no effect was produced by the incompetent testimony? In the progress of trials it often happens that incompetent evidence gets before the jury, either through the zeal of a willing witness or by inadvertence on the part of the counsel and court. Under such circumstances, when it is promptly withdrawn or excluded, and especially when, as is usual, the evidence is fragmentary and inconclusive, the correction cures the evil. But when, as in this case, incompetent evidence of so great import is

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Syllabus.

deliberately and forcibly introduced, the error cannot be cured by subsequently directing the jury to disregard it.

There may be cases in which the fact which the incompetent evidence tends to prove is so fully established by other evidence that the error would not cause a reversal of the judgment. But such cases rest upon a different reason, which is that the incompetent evidence adds nothing to the force of an otherwise proved fact. *Penn* v. *State*, 62 Miss., 450.

When the court cannot say with confidence that no other conclusion could have been reached by the jury upon the legal evidence in the case, the admission of incompetent and material testimony is ground for a new trial. *Taylor* v. *Adams*, 58 Mich., 187; *State* v. *Meader*, 54 Vt., 126.

The judgment is reversed, and a new trial awarded.

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HENRY R. C. FOSTER *v.* THE STATE.

1. HOMICIDE. *Evidence. Medical expert. Common knowledge.*

Where, on a murder trial, the relative position of the accused and the deceased, at the time of the killing, is a material inquiry, a medical expert, who has made a *post mortem* examination, may testify as to the point of entrance and exit, and the course and range of the ball through the body, but it is error to permit him to state his opinion that a hole in an adjacent wall was within the range, or to state his opinion as to the position of the arm and hand of the deceased when shot, these being conclusions resting in common knowledge, and not upon scientific learning.

2. SAME. *Trial. Presence of accused. Code* 1892, § 2391. *Constitutionality.*

The constitutional provision that one accused of crime shall be confronted by the witnesses against him, requires that all evidence, whether of living witnesses or inanimate objects, be produced before the jury in the presence of the accused and the court. Section 2391, code 1892, to the extent that it authorizes a jury, in a criminal case, to visit the scene of the offense unaccompanied by the accused or the court, is unconstitutional.

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Brief for appellant.

3. SAME. *Jury; visiting scene of homicide. Case.*

Accordingly, where a homicide occurred in a railway-coach, and, pending the trial for murder, the jury visit the scene, accompanied by the accused, but the latter is prevented by the officer from entering the coach with the jury, this is a denial of his constitutional right to be present when evidence is introduced, notwithstanding the jury remains in the coach only two or three minutes, and it is only for a part of this time that the accused is excluded.

4. MURDER TRIAL. *Evidence of previous difficulty. Threats.*

On a trial for murder, evidence of a previous assault by the deceased on the accused is incompetent, in the absence of evidence that it was connected with or related to the fatal rencounter, or that such previous assault was the result of enmity or threats of violence by deceased against the accused. And wherever the fact of a former difficulty may be proved by the state, the accused should be permitted to show its character.

FROM the circuit court of the second district of Yalobusha county.

HON. EUGENE JOHNSON, Judge.

Appellant has been convicted of the murder of John B. Morgan, and sentenced to life imprisonment. The facts of the case, so far as necessary to an understanding of the several points passed on by the court, are stated in the opinion.

A. J. McLaurin, for appellant.

1. Where there is any evidence which, if believed, would establish an overt, hostile act on the part of deceased at the time of the killing, it is competent to show that when the deceased and accused last met, the former had made a murderous assault upon the latter, and afterwards threatened to take defendant's life. *Guice* v. *State*, 60 Miss., 714. Where such overt act is shown, the previous difficulty may be given in evidence—not a part of it but all of it.

An apprehension of the necessity to slay may be created by particular preceding acts, reasonably connected in time or occasion with the fatal rencounter. Wharton on Homicide (2d Ed.), §§ 613, 617.

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Brief for appellant.

The character of the deceased for violence, as well as his animosity to defendant, as indicated by words and actions then and before, are admissible. *Ib.*, 607–618; *Cotton* v. *State*, 31 Miss., 504. The defendant is to be judged by his own lights. Wharton on Homicide, 610. See also *Chase* v. *State*, 46 Miss., 683.

2. It was error to admit testimony of the medical expert to show the position the arm of deceased must have been in when he was shot in the body. This could be as well known to others as to professional experts, being a matter about which the lay, or uneducated, mind is capable of forming a judgment. *Milwaukee Railway Co.* v. *Kellogg*, 94 U. S., 469. The jury, hearing such testimony, might conclude that it was bound by it, and would give no further consideration to the question. As it cannot be said that this error did not influence the jury to defendant's prejudice, a reversal must follow. *Jackson* v. *Jackson*, 28 Miss., 674.

3. The visit to the scene of the killing and inspection of the car was a part of the evidence of the state. It was introduced in the absence of the accused, and thus he was deprived of a constitutional right. The fact that he was excluded from the car by the mistake of the sheriff makes no difference. If one step in the trial can be taken in his absence, why not all? On this point see *Finch* v. *State*, 53 Miss., 363.

Coleman, Coleman & Coleman, on the same side.

1. The *overt act* of deceased is the main, the only, question at issue. The appellant and his witnesses say that, as he came up the aisle of the car, deceased saw him, and threw his hand back as if to draw a weapon. No witness for the prosecution denies this, but the medical expert is permitted to give an opinion as to the position of the arm and hand of deceased when shot, and this opinion is allowed to contradict the witnesses who swear as to facts. The expert is permitted to substitute his opinion for that of the jurors—in fact, to determine

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Brief for the state.

the guilt or innocence of accused by his mere opinion. Expert testimony is never allowed to prove a matter of common experience and knowledge. On this subject, see 7 Wend., 73; 55 Ark., 593; 17 S. W. Rep., 1071; 93 Cal., 445; 62 *Ib.*, 303; 39 N. Y., 245; 82 Ala., 32; 5 Ohio (C. C.), 597; 1 Denio, 311; 23 Tex., 331; 24 N. J. Law, 352; 71 Ind., 66; 29 Mich., 4; 78 N. Y., 611; *Dillard* v. *State*, 58 Miss., 368. The same objection exists to the testimony of the witness, McDade, as to his opinion as to a matter of common knowledge. 24 Ark., 255; 10 Ga., 529; 59 Ala., 92; 29 Ohio St., 171; 45 Iowa, 246.

2. The court erred in excluding evidence of an assault made by the deceased on defendant a short time previous to the homicide. It was important to determine the exact state of defendant's mind at the time of the killing, since murder is essentially the creature of intent. Defendant claimed, and he had a right to show, that there was no malice in his conduct. The reason of the rule admitting evidence of previous assaults and threats is well stated in *Russell* v. *State*, 11 Tex. App., 288. See also 27 *Ib.*, 768; 21 *Ib.*, 420; 24 Kansas, 68; 22 *Ib.*, 226; 92 Cal., 511; 37 *Ib.*, 676; 15 *Ib.*, 476; 62 *Ib.*, 303; 6 Bax. (Tenn.), 454; 32 La. Ann., 1084; 21 Ind., 26; 37 *Ib.*, 62; 93 U. S., 465; 8 Bush, 481; 80 Ky., 32; 19 Vt., 121; *Guice* v. *State*, 60 Miss., 714; *Spivey* v. *State*, 58 *Ib.*, 858; *Newcomb* v. *State*, 37 *Ib.*, 383; *Johnson* v. *State*, 54 *Ib.*, 430; *Johnson* v. *State*, 66 *Ib.*, 189; *Hawthorne* v. *State*, 61 *Ib.*, 749.

3. The court erred in allowing the jury to view the car in the absence of defendant. It was his right to be confronted by the witnesses for him. On this point we refer the court to Kerr on Homicide, § 346; 30 Ark., 328; 24 La. Ann., 46; 5 Neb., 31; 70 Cal., 193; 68 *Ib.*, 630; 68 Mo., 202; 4 Hum. (Tenn.), 289.

Frank Johnston, attorney-general, for the state.

1. Evidence as to the merits of the former difficulty was properly excluded. It is competent to prove, in connection

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Brief for the state.

with communicated threats, or an overt act, that the relations between the parties were not friendly, that they were at feud or that they had had previous difficulties or quarrels, as going to show the seriousness of the threats. But the inquiry cannot be extended into an investigation of the merits of previous difficulties. Otherwise, the inquiry would be interminable. It is immaterial which of the parties was in the right. The only thing to be proved is the fact of the enmity. See *Commander* v. *State*, 60 Ala., 1; *Gray* v. *State*, 63 *Ib.*, 66; *State* v. *Hannett*, 54 Vt., 83; Bishop's Crim. Pro., § 617. Where such evidence has been permitted, it is on the theory that the two difficulties are so immediately connected as that the former difficulty is part of the *res gestæ*. *Keene* v. *State*, 50 Mo., 357; *Haller* v. *State*, 37 Ind., 57; Wharton's Crim. Ev., § 753. In the case at bar, the prior difficulty was an isolated fact, and wholly inadmissible. Bishop's Crim. Pro., § 609.

2. Section 2391, code 1892, authorizing the jury to visit the scene of a crime, says nothing about the presence of the prisoner. The authorities are divided as to the right of the accused to be present. I refer the court to the argument of associate counsel, and his citation of authorities, only citing, in addition, *People* v. *Bonney*, 19 Cal., 427. The real inquiry seems to be whether any evidence was given in the absence of the prisoner.

In the case at bar, the defendant was present during the whole time, with the exception of about one minute. The momentary detention at the door was immaterial, and it seems to be trifling with the substance and playing with the shadow to argue that this was a prejudicial irregularity. I submit that the only right of the prisoner is that the jury shall not be tampered with.

3. There can be no error in the testimony of the medical expert as to the position of the right hand and arm at the time of the second shot. The fact that the arm was then raised against the body stands as a physical fact in the case. The

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Brief for the state.

inquiry is an open one as to where the arm was when the first shot was fired. This testimony did not affect that question. Again, his statement as to the course and range of the ball was not expert testimony. It was merely a description of the direction of the bullet. Any witness who had made the examination could have made the same statement. The testimony could not have changed the facts of the case. It bore only on the uncontroverted physical facts. If there was error in this respect, it was technical and not prejudicial. If incompetent testimony be introduced to prove a point already established, and on which there is no conflicting evidence, the verdict will not be disturbed. *Graves* v. *Railroad Co.*, 6 How. (Miss.), 548; *Fore* v. *Williams*, 35 Miss., 533; *Hand* v. *Grant*, 5 Smed. & M., 508; *Gerard's Case*, 50 Miss., 147. The above reasoning applies also to the testimony of the witness, McDade.

C. B. Mitchell, on the same side.

1. It was not error to refuse evidence of the details of the former difficulty. Proof was allowed of violent threats against the life of defendant, and that deceased had violently assaulted him a week or two before the killing. This is as far as the court could go; and, indeed, it would not have been error to exclude all the evidence as to the previous assault, as the evidence shows a case of assassination—that Judge Morgan never saw defendant when the latter shot, but was looking in the other direction. It was proper to exclude evidence of the particulars of the difficulty. *Sanders* v. *Commonwealth*, 18 S. W. Rep. (Ky.), 528; *People* v. *Thompson*, 92 Cal., 506; *Rutledge* v. *State*, 88 Ala., 85; '84 *Ib.*, 424; 74 *Ib.*, 18, 9; 63 *Ib.*, 66; 62 *Ib.*, 224. Moreover, the defendant got the full benefit of the evidence that deceased had assaulted and beaten him.

2. The failure of the accused to be present when the jury inspected the car was not error. The decisions as to this are divided, but that seems to be the better doctrine. He can-

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Brief for the state.

not, if present, ask or answer any questions, or in any way interfere with the acts, operations or conclusions of the jury. He would be a mere spectator. *State* v. *Ah Lee*, 8 Oregon, 214; *State* v. *Morgan*, 15 *Ib.*, 262; 17 *Ib.*, 635. The jury decides on the evidence, not upon the view. 49 Cal., 609; *State* v. *Adams*, 20 Kansas, 311. These decisions were under statutes similar to ours, and hold that by the jury visiting the scene of the offense, the place of trial is not temporarily transferred from the court-house. The jurors are conducted in a body while thus absent. This means that the place of trial is unchanged, that the jury is temporarily removed, just as when the case is finally submitted to the jury and it retires for deliberation. There is only a temporary removal. The judge, the clerk, the officers, the records, the parties and all that go to make up the organization of the court, remain in the court-room. While in charge of an officer, the jury, in legal contemplation, is in the presence of the court. The court is the fixed and permanent thing, the jury temporary, and serving only a partial purpose. In this case, defendant consented for the jury to go and visit the car, and the complaint that for about a minute he was excluded from it is groundless.

3. If there was technical error in allowing the medical expert to give his opinion as to the position of the arm of the deceased when shot, it could work no injury to defendant, because the facts were proven as to the locality of the wound and the ball, and were not denied. There is no reversible error in the record, and I submit the evidence shows a clear case of murder—that defendant shot deceased when the latter was not looking at him, and that no other verdict could be reasonably expected.

Argued orally by *Charles T. Coleman*, for appellant, and by *A. S. Buchanan* and *Frank Johnston*, attorney-general, for the state.

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Opinion of the court.

WOODS, J., delivered the opinion of the court.

1. The action of the court below in permitting the medical expert, introduced by the prosecution, to state the position of the arm and hand of the deceased at the time the wounds in the arm and body were inflicted, and, also, to give his opinion as to whether the bullet-hole in the side of the railway-car was in range with the two bullet-holes in the head of the deceased, is strongly assailed by counsel for the accused.

The inquiries were as to matters concerning which the medical expert had no scientific knowledge. He had made a *post mortem* examination of the deceased, and he had laid before the jury the results of his examination. He had shown the place of entrance and of exit of the bullet fired through the head of the deceased, and he had shown its course and range through the head; and then his testimony, as to the course and range of the bullet, should have ended. The flight and range of the bullet after leaving the head could only be established by inferences, conclusions drawn from proven facts, and these conclusions are based on the common experience and knowledge of mankind, and not upon any medical or scientific learning. Any man was as capable of forming an opinion as the expert. Given three holes, made by one bullet, in fixed objects, and the common experience and knowledge of mankind is all that is required to draw the proper conclusion as to the range of the missile. One man could establish the course of the bullet's flight as well as another. The physical facts laid before the jury, it was the province of that body to draw the conclusions for itself. The facts shown, the jury needed no expert opinion on which to rest its own. In matters of common knowledge and experience of the character we are considering, and, when scientific opinions are not required, or, indeed, possible, it is erroneous to fling the weight of a distinguished expert's opinion into the scale, with a view to having the jury adopt and act upon it, instead of forming and acting

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upon its own conclusion, drawn from the established facts. The range of the bullet through the head and into the side of the car was a material matter. Placing one's self at the point where the bullet entered the side of the car, and looking along the invisible line that the bullet traveled, and noting the marks of its exit and its entrance in the head of the deceased, we can fix the unseen pathway of the missile with more or less accuracy, and, prolonging our gaze along this pathway beyond the head of the deceased, we can fix the position of the accused when he fired the fatal shot; and this is precisely what was sought to be established for the jury by the opinion of the expert witness. The jury knew the proven facts as well as the witness; they both knew them as they had learned them from others; and the jury was as capable of drawing the proper conclusion from the proven facts as the expert. The prosecution had no right to substitute the expert's opinion for that of the jury.

These remarks apply equally to the effort to have the jury take the opinion of the expert as to the position of the arm and hand of the deceased when he was shot in the body. The facts from which the expert drew his conclusion, and on which he based his opinion, were relevant to a subject-matter of common knowledge, and the jury needed no opinions from experts, or others. They had all the facts, and they should have been permitted, uninfluenced by opinions from others, to draw their own conclusion and form their own opinion.

The witness, McDade, was told to give the jury his opinion as to the range of the bullet which passed through the head, taking as the factors in making up his opinion, the proven facts as to the position of the deceased, the places of entrance and exit of the ball in the head, and the hole made by the bullet in the side of the car. Why permit the *one* man to draw the conclusion and form the opinion when *twelve* had been selected and sworn to do that very thing?

2. It is contended by the counsel for appellant that there was error in the court's action in allowing the jury to visit

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and inspect the railway car in which the homicide occurred, in the absence of the accused. It is replied by counsel for the state that, admitting the right of the accused to be present, this right was not denied him. It is sufficient to say that the *right* was denied, but, as an act of grace on the part of the counsel for the state, the court then gave the accused permission to accompany the jury. But the officer having the jury in charge, through an unaccountable misapprehension of the court's final ruling on this point, forbade the accused entrance to the car, and only yielded the privilege when one of the counsel for the prosecution intervened and rectified his misapprehension. The jury was only in the car two or three minutes, and during a part of that brief space of time the accused was not permitted to be present. Under these indisputable facts, it cannot be said that the accused was not denied the right (if it was a right) to be present at the jury's view of the car.

Was it the right of the accused to be present when the jury visited and inspected the car? The answer to this inquiry will be found in ascertaining and determining what the purpose and object of this view was—what its nature and character was. Was it a part of the trial of the cause? Was it a step taken in the progress of trial, or was it an aimless, idle parade of the jury when not engaged in the discharge of its weighty duties as a most important part of a judicial tribunal?

Acting under the authority of § 2391, code 1892, and being of opinion that, "on the trial" of this cause, it was proper for the jury to have a view of the car in which the offense was charged to have been committed, the court below ordered the jurors to be conducted in a body, under the charge of an officer, to the car. Why are the jurors sent to the scene of the offense? Because, in the opinion of the court, it becomes proper to do so on the trial of the cause. Proper in what sense? There can be but one reply. It becomes proper in one of two views. The jury may be better able to under-

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stand and apply the evidence by examining the ground or scene of the offense, or the jury may receive evidence from inanimate witnesses which otherwise it would not have.

Without attempting to elaborate our views on this point, we remark that the reported cases in which some courts of last resort have held that the prisoner was not entitled to be present at a view of the premises on which the offense was alleged to have been committed, for the reason that, in such inspection, the jury is not taking or receiving evidence in the absence of the accused, but is, during a suspension of the trial, and while absent and separated from the court, merely receiving impressions from silent, inanimate objects that will enable it better to comprehend and apply the testimony in the case, are inconsistent, and beg the question. They assume that the court is composed of the judge, the clerk, the sheriff, and overlook the great fact that the jury is the right arm of the court in the administration of law. They assert that the jury is not receiving evidence, because it is absent from the court, and cannot take testimony except in the presence of the judge and the accused, overlooking the painful fact that illegal evidence may be taken, and unlawful methods may be employed for its introduction. They declare that only impressions are received by the jurors on such inspections which will enable them to understand and apply the testimony offered. But this concedes the proposition in dispute. Impressions are made on the mind of jurors by dumb witnesses. They do have evidence of inanimate things. They are receiving impressions, evidence, enlightenment from voiceless things, call it by whatever name you will; and they are themselves being thus made silent witnesses for or against the accused. They return to the court-room with impressions, opinions, formed by an examination of dumb, inanimate witnesses, and, if erroneous impressions and opinions have been made and formed, their hurt is beyond all cure, for the jurors may not speak out what may weigh on their minds, but are become themselves dumb, passive witnesses.

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Opinion of the court.

To say the jury cannot receive evidence by simply viewing the scene, is to insult common sense. The most convincing evidence is made by the sense of sight. The juror on the view *sees*, and thinks he knows what he thus *sees*, with all the conclusions flowing therefrom. He sees, or may see, more than a mere railway-car, or a naked room, or a piece of senseless earth; and, no matter what he *sees*, and *falsely sees*, he cannot speak, and have his mistaken conclusions corrected or removed. The impressions, the evidence made by the mute witnesses, may be more potent in fixing the jury's verdict than the living witnesses, speaking under oath to tell the truth.

Let us suppose an extreme case to illustrate the discussion—an illustration drawn from the case at bar. In the case at bar there is the evidence of two or three witnesses to the effect that there were mirrors on each side the car door, reflecting the interior of the car. Looking in these mirrors, these witnesses saw the accused coming down the car aisle in the direction of where the deceased sat. When near the deceased, he too saw the accused's reflection in the mirrors, and turned his head and threw his hand to his hip-pocket, and thereupon accused sprang back a step and fired. Now, suppose that, after the homicide, and before the view by the jury, for some reason the car has been overhauled and the mirrors removed. The jurors, we will suppose, are ignorant of such removal. They are sent by the court to make an inspection, and they see, not only where the deceased sat, and the hole made by the bullet in the side of the car, but they see with astonished and indignant eyes that there are no mirrors. They naturally conclude the witnesses who testified as to what they saw in them have committed perjury, and all their testimony is unceremoniously thrust away as unworthy of examination or consideration. And the jurors, thus themselves converted into silent witnesses, have made up a case which could never have been fabricated, if the view had been had before the whole court and in the

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presence of the accused. We are only supposing a case to illustrate the proposition that the jury is receiving evidence on a view of the scene of the offense, and the illustration perfectly demonstrates the soundness of our view.

The constitutional right guaranteed to every person charged with crime to be confronted by the witnesses against him, will require the production of all evidence from all witnesses, animate and inanimate, in his presence. But not alone must all evidence be had in the presence of the accused, but it must likewise be had and taken in the presence of the court trying the case. The accused must be tried in court, before the court, and not before the jury sent out by the judge to gather evidence away from the court, and away from the accused. The statute undertakes to confer authority upon trial courts in criminal cases to dismember the court in the midst of, and on, the trial, and to send the jury out of the presence of the court, and, in the absence of the accused, to receive impressions and draw conclusions and form opinions by means of the evidence of inanimate witnesses. As a step in the progress of the trial, the judge remains in the court-room, sends the jury out to take this testimony, and the accused is forbidden to even know what the evidence so gathered is. A trial conducted, in part, away from the place appointed for the holding of the court, in the absence of the judge and of the accused, is not that trial to which every man accused is constitutionally entitled. To the extent indicated, the law is unconstitutional.

3. It is strenuously insisted by the learned counsel for the accused that the court erred in excluding evidence of an assault made by the deceased on the accused a week or two before the homicide was committed. We are of opinion that there was error in the court's action in this particular, but not error of which the accused can be heard to complain. If it was a case—a rare, exceptional case—in which it was proper to show *a* former difficulty, the court should have permitted proof of *the* difficulty. If evidence of the fact that

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there had been a previous difficulty was admissible, then the accused should have been permitted to show the character of that occurrence. But was this one of the most infrequent, exceptional cases in which evidence of a previous difficulty was admissible? Was not the error of the court committed in letting in proof of the mere fact of the previous affair? The former difficulty does not appear to be connected with, or related immediately to, the fatal rencounter. It, as presented in the record before us, stands out as an independent, distinct transaction. It does not appear from the record that the previous difficulty was the sequel of the enmity of the deceased, or that it was made in pursuance of antecedent threats. Numerous threats of the deceased, which were made after that previous difficulty occurred, are clearly shown; but we have seen no evidence of any threats made before and leading up to that occurrence. If there had been threats of violence made by the deceased before the previous difficulty, and they had been followed up and made good when the deceased met the accused, then the proof offered to be made by the accused of the character of that difficulty might have been pertinent. It would, in that case, have shed light on the homicide. It would have illustrated the character of the deceased, and the greater or less probability of his doing again, in pursuance of his declared purpose, what he would have been shown to have done on the previous occasion, following up the threats which preceded that. It would have been more or less influential in determining the reasonableness of the apprehension of the accused that the deceased was about to do him great bodily harm, and that the danger of its accomplishment was pending and imminent, when, as the accused and two other persons swore, the deceased made an overt act as if to draw his pistol. But no threats antedating that difficulty were proved, and the admissibility of the evidence of the nature of that affair failed.

The general rule is the exclusion of evidence of previous

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difficulties. There are exceptional cases, in which the accused should be permitted to show the character of the former difficulty, but this record does not disclose the circumstances making the case at bar exceptional.

Reversed.

LEFLORE COUNTY v. STATE, EX REL., ETC.

1. MANDAMUS. *Stock law. Fence between counties. Code* 1892, § 2061.

Mandamus lies to compel a board of supervisors to perform the duty imposed by § 2061, code 1892, as to jointly building and maintaining a fence on or near the county line, to prevent stock straying from a county in which the stock law has not been adopted into an adjoining county where it is in force.

2. SAME. *Petition. Sufficiency of allegation.*

In a petition for mandamus, at the instance of a county that has adopted the law, to compel an adjoining county to join in building a line fence, it is not essential that it should be distinctly alleged that the adjoining county has not adopted the law. As the law is not in force in any county until adopted, the petition will be sufficient as to this, if it avers that a fence between the two counties is necessary, to prevent stock straying from the adjoining county into the county adopting the law.

3. COUNTIES. *Fences between. Legislative control.*

It is within legislative control to provide for a joint fence between counties in such case. The benefits are mutual, and it cannot be said that a burden is unwarrantably imposed on the county declining to act. In our arrangement of counties, each must be allowed to act in such matters, and the inconvenience, if any, resulting from contiguity of territory, affords no ground for legal complaint.

4. SAME. *Validity of the law. Practical difficulties. Not anticipated.*

It is not a valid objection to the law that practical difficulties exist in reference to the location of the fence and procuring the site for it. It will be time enough to deal with these if encountered. They will not be anticipated.

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Statement of the case.

5. STOCK LAW. *Electors. Constitutional qualifications; not applicable.*

The provisions of the constitution and the election ordinance as to registration and qualification of electors have no application to elections under the stock law. The legislature has plenary power over the subject.

6. JOINT FENCE. *Manner of raising funds. Code* 1892, § 2062.

In a proceeding by mandamus, at the instance of a county which has adopted the law, to compel an adjoining county, which has not done so, to unite in erecting a line of fence, consideration of § 2062, code 1892, as to the manner of raising money to build and maintain the fence, is not involved.

7. SAME. *Obligation on both counties. Refusal of one. Right of the other.*

The fact that one county, after refusal by the other to do its part, proceeds alone, and makes provision for erecting part of the fence, will not relieve the other county from its obligation. If one county refuses to co-operate, the other may build the fence and recover half the expense. The law charges each with half the expense, and there is no way to escape it.

FROM the circuit court of Leflore county.

HON. R. W. WILLIAMSON, Judge.

Mandamus by the state, on the relation of the attorney-general, against the board of supervisors of Leflore county. The purpose is to compel that county to unite with Carroll county in building a line fence between the two counties, such fence being made necessary by the adoption of the stock law in Carroll county.

The petition alleges that an election was held in Carroll county August 16, 1892, under chapter 47, code 1892, to determine whether the stock law should be declared in force, and that said election resulted in favor of putting the law into operation; that the board of supervisors had declared that the law should be in effect after February 15, 1893; that the board of supervisors of Leflore county had been notified of the result of the election; that Leflore is affected by the adoption of the law in Carroll county, and that, in order to secure its operation, a fence between the two counties is necessary to prevent stock from Leflore county trespassing in Carroll; that the board of supervisors of Carroll county had

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Brief for appellant.

attempted, unavailingly, to confer with the supervisors of Leflore county in regard to the erection of the fence; that Carroll county had proceeded to award contracts for the erection of one-half the fence, which is now being built; that the board of supervisors of Leflore county has failed and refused to take any official action in reference to building the fence or defraying any part of the expense of the same. The petition was filed February 1, 1893.

The defendants demurred to the petition on various technical grounds. Among other things, it is assigned as cause of demurrer that the petition fails to show that Leflore county had not adopted the stock law; that it fails to show that the election had been properly ordered and held in Carroll county; that it fails to show that any provision had been made, or could be made, to secure a right of way upon which to build the fence; that the issuance of a writ of mandamus is not authorized under the facts stated in the petition, and that chapter 47, code 1892, in relation to fences and stock, is unconstitutional.

The demurrer was overruled, and, defendants declining to answer, judgment final was entered granting the prayer of the petition. Defendants appeal. The opinion contains a further statement of the case.

A. McC. Kimbrough, for appellant.

1. The petition does not show any sufficient order of the board for the election in Carroll county. The powers conferred on the board by chapter 47, code 1892, are extraordinary, and it must appear affirmatively that every thing required was done, and at the proper time and place.

2. Section 2061, code 1892, provides that the counties shall jointly build and keep in repair fences on or near the county line. Here the petition alleges that Carroll county alone is building one-half of said line fence, which it was not authorized to do. There is no authority to compel Leflore county to aid in doing this. Mandamus only lies where there is a

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Brief for appellant.

specific right or a positive duty, and where there is no other specific legal remedy. Code 1892, § 2846; 14 Am. & Eng. Enc. L., 94, note 2; 2 Chand. (Wis.), 250.

3. The petition fails to show that Leflore county had not adopted the stock law, and the demurrer should have been sustained for that reason. 14 Am. & Eng. Enc. L., 222, 223.

4. Chapter 47, code 1892, is unconstitutional. Section 2056 establishes a property qualification for electors, and § 2057 provides, as the only qualification of electors, that they shall be resident freeholders or leaseholders for a term of three years or more, while the constitution provides entirely different qualifications. Section 241 of the constitution gives the right of franchise only to male inhabitants, who must possess the qualifications therein mentioned. See, also, §§ 244 and 249, the latter providing for the registration of voters as an essential qualification. The law under consideration permits men, women, minors, and even felons and aliens, to vote. It disfranchises constitutional electors by fixing a property qualification.

This law also violates § 17 of the constitution, which provides that private property shall not be taken for public use except on due compensation being first made in a manner prescribed by law. Here there is no manner prescribed for making compensation to the owners of land for the right of way. The law also violates that section of the constitution which provides that no person shall be deprived of property without due process of law and without notice of trial. *Donovan* v. *Vicksburg*, 29 Miss., 247. Here Carroll county is attempting to coerce Leflore county to build the fence which is made necessary without any participation by the citizens of Leflore county. This is taxing Leflore county to protect property in Carroll county. It is taxation without representation.

A. G. Paxton, on the same side.

1. Mandamus only lies to enforce performance of an act

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which the law specially enjoins as a duty. Section 2061, code 1892, provides that counties effected by putting into operation the stock law shall *jointly* build or keep in repair line fences.

2. Section 2062 provides that the board may levy taxes only on specific lands to provide for building the fence. If the law is of any force, the board is prohibited from levying taxes generally for this purpose. The law taxing specific lands is unconstitutional. It is not equal and uniform. Const., § 112.

In undertaking to declare that benefits will result from the location of the fence, the legislature has not only transcended its powers in acting as a judicial tribunal, but has concluded the citizen as to any claim for damages for taking his property. 3 How., 240; 34 Miss., 241; 36 *Ib.*, 310; 37 *Ib.*, 182; 39 *Ib.*, 385; 65 *Ib.*, 335; 68 *Ib.*, 539.

3. No means are provided for the expense of locating the fence. An expensive survey must be made, for which there is no provision. No means are provided for the acquirement of the right of way. It must be built over private property, which cannot be taken until paid for. Const., § 17.

4. This section of the constitution provides that compensation shall be made *in the manner to be prescribed by law*, and no manner is prescribed by the statute under consideration. The court will not compel the board of supervisors to become trespassers in attempting to take private property which it has no authority to take.

5. The chapter of the code under which the election was held is unconstitutional for other reasons. Section 2057 of the code, as to ballots, is utterly vague. The voter could not intelligently mark his ballot, as contemplated by § 246 of the constitution and § 4 of the election ordinance.

The statute assumes to confine the vote to freeholders and leaseholders. This cannot be done. Cooley's Const. Lim., 758, 774, 775; 38 Miss., 652; 58 *Ib.*, 738. Females, infants and aliens are made qualified voters, which is not allowable. This is not a matter coming within the police power. Black

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on Const. Prohibitions, 64; 3 Am. & Eng. Enc. L., 747, note 1; 18 *Ib.*, 739, 748; 2 Kent's Com., 441, and notes; 9 Mich., 285; Cooley's Const. Lim., 713; 51 Miss., 738.

Voters provided for are not registered as required by § 242 of the constitution. An entirely separate registration is required, owing to the different qualifications of the voters allowed to participate. On the other hand, persons who are qualified electors under the constitution, could not vote at an election under this statute. See § 2056, code 1892. Section 249 of the constitution prescribes registration as an essential qualification to vote at any and all elections.

Percy R. Somerville, for appellee.

1. Mandamus is the appropriate remedy. Section 2061, code 1892, prescribes a duty, and vests no discretion. See 5 Nev., 341; 2 Va. Cas., 9, 499; 2 Pick., 419; 5 Ohio St., 497; 23 Fla., 632; 81 Pa., 132; 36 Cal., 595; 47 Md., 145; 48 Ill., 233; 80 Ind., 478; 63 Miss., 135.

The wisdom of the statute is not in question. It is a part of the written law, and will be enforced. If we grant appellant's contention is correct, that the general funds of the county cannot be used to build the fence, still, we contend that § 2062, code 1892, is unobjectionable.

As to the right to levy taxes on certain property specially benefited, see 2 Kent's Com., 340; 5 Vroom (N. J.), 227; 3 Fairfield (Me.), 222; 3 Paige (N. Y.), 73; 47 Miss., 713; *Vicksburg Bank* v. *Worrell*, 67 Miss., 47.

If the legislature possessed the power to pass a general stock law, it had the power to make its operation dependent upon any contingency it might devise. *Schulherr* v. *Bordeaux*, 64 Miss., 59.

If a survey should be necessary, the board of supervisors would have ample power to make it under the general chapter on that subject.

2. This is not an election contemplated by the constitution, and registration was not necessary.

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3. The police power is ample to authorize preventing stock running at large. Cooley's Const. Lim., 588; Dillon on Mun. Cor., 345; 15 N. W. Rep., 437; 51 Miss., 738; *Julienne* v. *Jackson*, 69 *Ib.*, 34.

The petition sets forth a case authorizing the issuance of the writ, and shows the necessity therefor.

W. F. Stevens, on the same side.

1. Mandamus is the proper remedy. High's Ex. L. Rem., 413; Moses on Mandamus, 102, 104, 126, 152, 155; 63 Miss., 135. No discretion is vested in the board of supervisors as to the duty in question, which is a plain and ministerial one. Code 1892, § 2061.

2. The board has ample power to levy taxes necessary to meet the expenses incident to building the fence. The legislature may impose local taxation in proper cases. Therefore, § 2062 of the code is not objectionable. 27 Miss., 209; 38 *Ib.*, 653; 48 *Ib.*, 713; Cooley's Const. Lim., 617, 619.

3. The provisions of the constitution in relation to the qualification and registration of voters have no application. They apply only to such elections as are contemplated by that instrument.

4. By the general police power, persons and property are subject to such restriction and burdens as are necessary to secure general health, comfort and prosperity. Cooley's Const. Lim., 708; 4 Blackstone's Com., 162; 27 Vt., 140; 29 Miss., 53; 94 U. S., 113; 51 *Ib.*, 735; *Julienne* v. *Jackson*, 69 Miss., 34.

5. The power to enact the law included the power to determine the conditions upon which it should become operative. 38 Miss., 653; 51 *Ib.*, 744; *Schulherr* v. *Bordeaux*, 64 *Ib.*, 59.

6. The election ordinance, cited by opposite counsel, has no application. It is restricted in its application to such political elections as were therein contemplated, and no further. It was never intended to trammel the discretion of the legislature in reference to matters committed exclusively to it.

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7. In response to the suggestion that there is no provision for a condemnation of the right of way for the fence, we submit that this is a contingency that may never arise. But the board of supervisors would have ample power, under the chapter on eminent domain.

The statute is free from all objection as to its constitutionality.

L. M. Southworth, on the same side.

CAMPBELL, C. J., delivered the opinion of the court.

The petition sufficiently shows that an election was ordered and held in Carroll county to determine whether the "stock law" should be declared in force in that county, and that the result was in favor of it, and that the board of supervisors, in pursuance of the result of the election, declared that the stock law should be in force in said county from the fifteenth of February, 1893. Leflore is an adjoining county, and, while it is not distinctly and positively averred, as good pleading requires, that Leflore county has not adopted the stock law, it sufficiently appears, in view of the fact that the law is not in force in any county until it has been adopted, and the language of the petition is strongly suggestive of the fact that Leflore has not adopted the law, since the averment is that a fence between the two counties is necessary to prevent stock from Leflore county straying therefrom and trespassing in Carroll county.

Mandamus is an appropriate remedy to compel the performance by a board of supervisors of the duty imposed by § 2061 of the code of 1892, as to jointly building and keeping in repair a fence on, or near, the county line to prevent stock straying from one county, in which the stock law is not in force, into the other, in which it is in force.

The object of that section is to make the county which adopts the stock law, and the county which does not, each chargeable with the burden of erecting and maintaining the

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fence necessary to meet the conditions. By adopting the law, the people of the county in which the law is put in force are entitled to cultivate their lands without the protection of fences. Their farms are to be "turned out," and their stock fenced in, so as to keep them off the land of others. Their lands are to be protected from stock, not by fences, but by law. Without a fence to prevent stock from straying from a county not having the stock law into one that has, the owners of stock thus straying would be the sufferers from seizure of their stock by persons depredated on by them. Hence the provision for a fence about the county line, and, as it is rendered necessary for the protection of owners of stock in a county not having the stock law, and they will be benefited, part of the expense is chargeable on that county, and since this necessity has arisen from the determination of the other county to adopt the stock law, part of the expense is chargeable to it. The law is intended to effect justice in this matter. Instead of declaring that one county may put the stock law in force and enjoy its full benefits, without further charge than the necessity of making needed provision for confining stock in that county, whereby the stock in contiguous counties would, from their instinct to wander, be continually exposed to seizure, and to be dealt with under the law as trespassing animals, entailing loss upon their owners, and producing endless vexation and disturbance; in order to avoid these evils, the provision was made for a fence, at or near the county line, to be built and repaired at the joint expense of the adjoining counties. Instead of being a burden unwarrantably imposed on the county not adopting the stock law, it is conferring a benefit on it, in requiring the other county to bear half of the expense of the fence so necessary to keep stock from straying into danger, and loss to their owners. True, but for the action of one county adopting the stock law, a necessity for the fence between the counties would not exist, but, in our arrangement of counties, the right of each to act independently of others in such

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matters as authorized by law, must be recognized and submitted to, and the inconvenience, if any, resulting from contiguity of territory is an unavoidable incident not affording cause for legal complaint. The matter is within the control of the legislature, and the scheme provided is as above set forth, and whether the wisest or not is not for the courts to say.

It is suggested that practical difficulties exist in reference to the location of the fence between the two counties, and procuring the site for it. If this be true, it will be time enough to deal with the difficulties when encountered. They should not be anticipated. It is probable that a hearty acceptance of the law, and the result of the action of Carroll county, by Leflore, and a determination by all concerned to discharge duty, as imposed by the law, will remove all obstacles, and lead to the building of the needed fence. Certainly it appears to us to be a matter of far more concern to Leflore to have that fence erected than to Carroll, as a consideration of the practical consequences to owners of stock in Leflore, if the fence shall not be built, must suggest.

The provisions of the constitution as to qualified electors, and registering electors, and the election ordinance adopted by the constitutional convention, have been appealed to as rendering unconstitutional the provisions of the code as to a stock law. We reject this view. There is nothing in the constitution or ordinances at war with the stock law. The legislature might pass a stock law for one or all the counties without a vote of the people on the subject. It might empower each board of supervisors to declare such law in force, without vote or petition of the people, and, having plenary power over the subject, was authorized to prescribe the conditions on which the boards might act.

A consideration of § 2062 of the code, as to the manner of raising money to defray the expenses of building and repairing fences, is not called for now. That will arise hereafter. The question now is, whether Leflore must join Carroll in

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building a fence, not how it is to be paid for. That it is a county burden, and to be borne as other county expenses, is clear, unless a levy may be made only on specific lands, as provided by § 2062. The proposition that the boards of supervisors may not raise money for fences in any other way than as provided by that section is not maintainable. The charge is upon the county, with power in the board to designate certain lands to bear the expense instead of the county. Preceding sections impose the burden. Section 2062 confers power to limit it as prescribed.

The objection that Carroll has gone on and made provision for part of the fence is not a reason for refusal by Leflore to do its part. The counties should confer and co-operate in the work, but if one will not, when applied to, the other may proceed alone, and call on the other for half the reasonable cost. The law charges each county with half the expense, and there is no way to escape it.

Affirmed.

NATCHEZ, JACKSON & COLUMBUS RAILROAD CO. *v.* JAMES W. LAMBERT, TAX-COLLECTOR.

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1. EXEMPTION FROM TAXATION. *Legislative power. Mobile & North-western Railroad. Charter.*

Section 21 of the act of July 20, 1870 (Laws, p. 255), incorporating the Mobile & North-western Railroad Company, providing that all taxes to which it might be subject for thirty years should be applied to payment for constructing the road or debts incurred therefor, unless its annual net earnings should exceed eight per cent., and that the affidavit of the president or cashier that such application had been made, should be accepted by tax-collectors in lieu of money for such taxes, was, in effect, an exemption from taxation upon the conditions named, and this exemption the legislature had the power to confer, but not to make irrepealable. *Mississippi Mills* v. *Cook*, 56 Miss., 40.

2. SAME. *Natchez, Jackson & Columbus Railroad Company. Acts* 1878 *and* 1890.

By the acts of August 8, 1870 (Laws, p. 327), and March 5, 1878 (Laws, p.

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233), the immunity from taxation conferred by said section was extended to and confirmed in the Natchez, Jackson & Columbus Railroad Company, and, while it was revoked by the code of 1880, it was restored by the act of March 12, 1884 (Laws, p. 29), and by the revenue act of 1890 (Laws, p. 6), this exemption was again recognized.

3. SAME. *Consolidation. Louisville, New Orleans & Texas Railroad Company. Exemption. How secured. Act* 1890.

The said Natchez, Jackson & Columbus Railroad Company was authorized, by the act of February 19, 1890 (Laws, p. 675), "to sell absolutely all or any part of its railroad and other property, . . together with all franchises, powers and immunities;" and, by the second section of said act, was authorized to consolidate with the Louisville, New Orleans & Texas Railroad Company, under the latter name. *Held*, the latter company, by its purchase or consolidation, acquired the franchises, rights, powers, privileges and immunities each company had before, and the affidavit required to secure exemption from taxation on what was the Natchez, Jackson & Columbus Railroad could be made by the corresponding officer of the consolidated company.

4. SAME. *Exemption. How lost. Provision of original charter.*

Upon such purchase or consolidation, the remote contingency on which the said exemption from taxation should be lost, namely, if the earnings should exceed eight per cent., was intended by the legislature either to be waived by the state or to become applicable whenever the annual earnings of the Natchez, Jackson & Columbus Railroad Company, as a component part of the Louisville, New Orleans & Texas Railroad Company, should amount to eight per cent.

5. SAME. *Yazoo & Mississippi Valley Railroad Company. Exemption from taxation.*

After consolidation of the Louisville, New Orleans & Texas Railway Company with the Yazoo & Mississippi Valley Railroad Company, the latter company succeeded to the said immunity from taxation on that part o its lines which formerly comprised the Natchez, Jackson & Columbus Railroad.

6. EXEMPTION FROM TAXATION. *Vested rights. Const.* 1890, § 181.

Said exemption from taxation is not affected by § 181, constitution 1890, declaring that the property of all corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, for that section expressly provides that exemptions from taxation then existing should remain in force for the time fixed by charter or the general laws, unless sooner repealed by the legislature.

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Statement of the case.

7. RES JUDICATA. *Plea. Former suit. Decree not on merits.*

To a bill by the Natchez, Jackson & Columbus Railroad Company, to enjoin the collection of taxes, exemption from which it claims under its charter and other legislation, a plea of *res judicata* is bad that is founded upon a decree sustaining a demurrer to a similar bill filed by the Louisville, New Orleans & Texas Railway Company, claiming, under its purchase of the Natchez, Jackson & Columbus Railroad Company, the benefit of said exemption from taxation, it appearing from the plea that the affidavit as to the payment of the amount of taxes in the construction of the railroad required to secure the exemption, contained no reference to the Natchez, Jackson & Columbus Railroad, and that the bill in that case was therefore fatally defective.

FROM the chancery court of Adams county.

HON. CLAUDE PINTARD, Chancellor.

Appellant, the Natchez, Jackson & Columbus Railroad Company, filed this bill against James W. Lambert, sheriff and tax-collector of Adams county, to enjoin the collection of *ad valorem* taxes, assessed against it for the years 1891 and 1892. Said company claims exemption from all taxation by virtue of its charter and under certain acts of the legislature, the material parts of which are stated in the opinion. A similar bill was filed at the same time by appellant to enjoin the collection of privilege taxes, and, as the points of law involved in both suits are the same, the two were heard together.

Prior to the institution of these suits, the Louisville, New Orleans & Texas Railway Company had filed its bill, in the same county, to enjoin the collection of taxes claimed for the year 1891, against that part of its lines which, before its purchase of the Natchez, Jackson & Columbus Railroad, comprised that road. To evidence its right to said exemption, it filed, as an exhibit to its bill, the affidavit of its cashier that the amount of taxes demanded had been applied to the payment of debts incurred in the construction of said road. The affidavit referred to the fact that the Louisville, New Orleans & Texas Railway Company was formed by the consolidation of the Memphis & Vicksburg Railway Company with several

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other railway companies, under authority of acts of the legislature, but the affidavit makes no mention of the Natchez, Jackson & Columbus Railroad. The plea of *res judicata* recites, and by its exhibits shows, that the demurrer to this bill was sustained, and that an appeal, taken from the decree sustaining the demurrer, was pending in the supreme court.

The court below held that the plea of *res judicata* was good as to the taxes of 1891. It also sustained defendant's demurrers to the bills as to the taxes of 1892, and from these decrees complainant appeals.

Mayes & Harris, for appellant.

It was competent, under the constitution of 1869, for the legislature to confer upon the appellant exemption from taxation, but acts granting such exemptions were always subject to repeal. *Mississippi Mills* v. *Cook*, 56 Miss., 40. This condition of the law was recognized also in *McCulloch* v. *Stone*, 64 Miss., 378; *Railroad Co.* v. *Thomas*, 65 *Ib.*, 553; *Bank* v. *Worrell*, 67 *Ib.*, 47; *Attala County* v. *Kelly*, 68 *Ib.*, 40; *Railway Co.* v. *Taylor*, 68 *Ib.*, 361.

It cannot be said that § 181 of the constitution of 1890 operates as a repeal of this exemption. It expressly saves rights then existing. Although the legislature, in granting exemptions, did not part with its right to repeal them, it has never done so in this case.

The immunity was not lost by the sale to the Louisville, New Orleans & Texas Railway Company. By this sale the latter company acquired all the privileges and rights granted by § 21 of the charter of the Mobile & North-western Railroad Company. *Railway* v. *Taylor*, *supra*. Besides, the Louisville, New Orleans & Texas Railway Company possessed all the rights and franchises of the several companies out of which it had been formed, and among these was the right to purchase any connecting road, and, in so doing, to acquire all the benefits, rights and franchises of said road or company. Laws 1882, p. 932. This power also came to said railroad

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company by its organization. The matter is set at rest by § 1 of the act of February 19, 1890, which expressly authorized the Natchez, Jackson & Columbus Railroad Company to sell all or any part of its railroad, together with its franchises, rights, powers and immunities. And by § 2 of said act it was expressly authorized to consolidate with the Louisville, New Orleans & Texas Railway Company. We may concede that a privilege or exemption does not, in the absence of legislative sanction, pass to a purchaser, but when such sanction is given, as we contend was done in this case, the immunity in question passes to the purchaser. The words used are more than sufficient to pass the exemption claimed. 16 Wall., 344; 3 Fed. Rep., 266; 24 *Ib.*, 614; 109 U. S., 244; 146 *Ib.*, 279. It is true that in the federal cases there is a controversy over the force of the word privileges, dissociated from any text bearing out the claim of continued exemption, but in a case like this the immunity from taxation passes to the purchaser, as is settled by the case of *Tennessee* v. *Whitworth*, 117 U. S., 139, and on this case we mainly rely. If the terms used are not sufficient to embrace exemption from taxation, then the Natchez, Jackson & Columbus Railroad Company itself never had it, for by these words the right claimed, and subsequently recognized by the legislature, was conferred upon that company. This is not a case where railroad property is alienated from a favored company into the hands of one not so favored. Both companies possessed the privilege or exemption.

This immunity was not lost by the consolidation of the Louisville, New Orleans & Texas Railway Company with the Yazoo & Mississippi Valley Railway Company. The latter company had authority by its charter to consolidate with any other railroad company, and, by the contract of consolidation, it was expressly provided that all the rights, powers, privileges, immunities and franchises belonging to either company should be vested in the consolidated company.

(Counsel for appellant here reviewed at great length all the

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cases relied on by appellee touching this branch of the case, contending that this case is controlled by the decision and reasoning in the case of *Tennessee* v. *Whitworth*, *supra*.)

The plea of *res judicata* was insufficient, and not sustained. The affidavits exhibited with the bill alleged disbursements on account of the construction of a railroad other than the Natchez, Jackson & Columbus Railroad. Moreover, the bill in that case was filed by different parties, and alleges a different state of facts.

Frank Johnston, attorney-general, for appellee.

The immunity granted by § 21 of act of July 20, 1870, was, in effect, if not technically, a conditional exemption from taxation, the conditions being (1) that it should not continue for more than thirty years; (2) that it should cease when the earnings of the company amounted to eight per cent.; (3) that each year a sum equal to the taxes should have been paid on debts incurred for construction. Such an immunity is a clear conditional limitation upon the taxing power of the state. *Railroad Company* v. *Maine*, 96 U. S., 499. The statute *in form* makes the dedication of the taxes to the railroad company, but, in fact, no taxes were to be paid. It was essentially an exemption from taxation. The power to donate public moneys, and the power to tax, are distinct. But transposition of terms, and the ingenious employment of particular phraseology, cannot confuse or confound the substantial thing accomplished by this statute. The purpose was, obviously, to evade the constitutional provision then in force declaring that property of corporations should be subject to taxation, and, by calling this immunity an appropriation, to make it irrepealable as a contract. This the legislature could not do. *Mississippi Mills* v. *Cook*, 56 Miss., 40. This exemption was clearly repealed by the code of 1880, and it is a serious question whether the act of 1884 revived exemptions that had been repealed by that code, and were not existing at the time of the adoption of the act, or whether it merely

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Brief for appellee.

operated to preserve exemptions then in force. Under the rule of strict construction universally applied to statutes granting exemptions, it would seem that the act of 1884 did not revive exemptions that had been repealed. This reason applies, also, to the act of 1890.

The general rule is that exemption from taxation is the personal privilege of the corporation to which it is granted, and perishes with that corporation, unless the clear and express intention of the law requires the exemption to pass as a continuing franchise to a successor. *Railroad Co.* v. *Commissioners*, 112 U. S., 609; *Picard* v. *Railroad Co.*, 130 U. S., 637. These cases also establish that the language used in § 1, act of February 19, 1890, cannot pass the exemption by the sale therein contemplated. The second section of said act, which provides for consolidation, is silent as to the transfer of the exemption to the new corporation contemplated. If the two companies had consolidated under the second section, the consolidated company would not have acquired the exemption from taxation. *Railroad Co.* v. *Maine*, *supra*; *Railroad Co.* v. *Berry*, 113 U. S., 465. It will thus be seen that the Louisville, New Orleans & Texas Railway Company claims to have acquired, by purchase, an exemption it could not have acquired under the consolidation.

The exemption from taxation claimed by the Louisville, New Orleans & Texas Railway Company for its own road and property did not pass to the Yazoo & Mississippi Valley Railway Company by the consolidation made in 1892. Upon the extinction of the former company, all exemptions enjoyed by it ceased. The immunity from taxation was not transmissible. 18 Wall., 206; 93 U. S., 217; 103 *Ib.*, 421; 109 *Ib.*, 244.

K. Palmer Lanneau, on the same side,

Filed a brief limited to the discussion of the question of *res judicata*, and, in support of the plea, contending that the question was open to inquiry and within the scope of the

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pleading in the former suit brought by the Louisville, New Orleans & Texas Railway Company, and, in support of this contention, cited Story Eq. Pl., § 736–738; 7 Wall., 102.

Argued orally by *E. Mayes*, for appellant, and *K. Palmer Lanneau* and *Frank Johnston*, attorney-general, for appellee.

CAMPBELL, C. J., delivered the opinion of the court.

It was not known what interpretation would be put on § 13, article 12, of the constitution of 1869, and § 21 of the act to incorporate the Mobile & North-western Railroad Company, approved July 20, 1870 (Laws 1870, p. 255), was a device to meet an assumed view of that section of the constitution. It took the form of an irrepealable (?) agreement by the state with the company, that all taxes to which it might be subject for thirty years should be applied to payment for constructing said road, or debts incurred for that; and that the affidavit of the president or cashier of the company that such application had been made during the year, should be accepted by tax-collectors in lieu of money for such taxes. A proviso is to the effect that, whenever the profits of the company should enable it to pay an annual dividend of eight per cent. upon its capital stock, the foregoing agreement should terminate. Although this was a thin disguise to evade constitutional restraint apprehended to be contained in the section mentioned, it was resolved to secure the benefit of the provision to other railroad companies; and, on August 8, 1870, an act of the legislature was approved to extend the provisions of the twenty-first section of the act to incorporate the Mobile & North-western Railroad Company to several other companies, and, among them, to the Natchez & Jackson Railroad Company, which afterwards became the Natchez, Jackson & Columbus Railroad Company, and they were, by said act, declared to be entitled to "all the rights, privileges, immunities and franchises" granted by said twenty-first section. By act approved Feb-

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ruary 25, 1875 (Laws, p. 66), every railroad company in the state was required to pay a privilege tax; and, on March 5, 1878 (Laws, p. 233), an act was approved, which recites the act of August 8, 1870, cited above, and that doubt as to its validity, because of its history, existed, and, to put the matter beyond doubt as to this, the twenty-first section aforesaid was re-enacted and applied to the charter of the Natchez, Jackson & Columbus Railroad Company. In 1878 this court interpreted § 13, article 12, of the constitution of 1869, to mean that the property of corporations for pecuniary profit could not be placed beyond the reach of the taxing power; that the legislature could forbear, during pleasure, to tax, but could, at any time, revoke a grant of immunity from taxation contained in any act passed since the adoption of the constitution of 1869. *Mississippi Mills* v. *Cook*, 56 Miss., 40.

By the code of 1880, each railroad in the state was subjected to taxation; but, in 1884, by act of March 12 (Laws of 1884, p. 29), the code was amended so as to restore to the Natchez, Jackson & Columbus Railroad Company the exemption from taxation "provided in its charter, and acts amendatory thereof." It is worthy of remark, that this act characterizes the exemption as "from taxation," as plainly it was. The revenue act of 1890 continues this exemption to railroads entitled to it (Laws 1890, p. 6). It was in the power of the legislature at any time to annul the agreement contained in the twenty-first section aforesaid. It had complete control of the matter, and could revoke the provision for immunity from paying taxes, which is undoubtedly immunity from taxation, for *paying is the burden*. Instead, it manifested a determination to preserve this immunity, and restored it to the Natchez, Jackson & Columbus Railroad Company in 1878 and 1884, and guarded it against repeal by act of 1890, as shown above, and, by act approved February 19, 1890 (Laws, p. 675), said company was authorized "to sell absolutely all or any part of its railroad and other property, . . . together with all franchises, rights, powers, privileges and im-

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munities," etc.; and, by the second section of said act, the Louisville, New Orleans & Texas Railway Company and the Natchez, Jackson & Columbus Railroad Company were authorized to consolidate with each other, under the name of the former, *upon such terms as they might agree upon.*

The question is as to the *intent* of the legislature as to the continuance of the immunity from taxation it enjoyed after a sale by the Natchez, Jackson & Columbus Railroad Company, or consolidation, as authorized. It is not a question of legislative power, for that is undoubted. Nor are the considerations which justly cause courts to lean against a grant of immunity from taxation, so influential here as they often are, for there can be no danger of tying the hands of the taxing power. It is merely a question of legislative purpose deducible from the language employed, considered in connection with the history of the dealing with the subject by the legislature. Thus considered, we have no hesitation to declare that the intention of the legislature was that a purchaser should get the railroad just as held by the Natchez, Jackson & Columbus Railroad Company, with all franchises, rights, powers, privileges and immunities possessed by it under the previous legislation; and, in authorizing consolidation by the two companies named, the purpose was that the united company should enjoy the franchises, rights, powers, privileges and immunities each had before; and that the state, in consenting thus, must be held to have contemplated that the affidavit to evidence the application of money to pay for construction, which was to be a legal tender for taxes, might be made by the proper officer of the consolidated company; and, as to the remote contingency on which the arrangement to escape the burden of taxation was to cease to be operative, the state may be justly assumed to have intended to waive that condition, or else, to have looked to its right to claim a cessation of the immunity when the condition mentioned in the proviso of the twenty-first section mentioned, should exist as to the Natchez, Jackson &

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Columbus Railroad as a component part of the consolidated company. But it is to be remembered that the state was not parting with any thing, was renouncing no right, foregoing nothing, except for the time being, to let matters stand as they were, and by the light of this its act is to be interpreted.

This case is very unlike *Railroad* v. *Maine*, 96 U. S., 499. There the right of the State to tax was involved, and important requirements made of the several companies which, by consolidation, made a *new* company, of which no requirement was made with reference to those duties imposed on the separate companies, having reference to taxation, and the new company was held subject to the power of the state to tax. Nothing was required of the Natchez, Jackson & Columbus Railroad Company on this subject, but it had the privilege to pay taxes by a prescribed affidavit, which could be as well made by an officer of a new company, having control of it, as by one of the Natchez, Jackson & Columbus Company. And, as to the very remote contingency mentioned in the proviso, that could be availed of as well under new control as under the old. The substantial thing aimed at was to free the road from taxation for thirty years by the easy terms of making an affidavit. But, in truth, all knew this was mere grace, and could be withdrawn at will. The delusion that the restriction of the constitution could be escaped by the circuity employed in the twenty-first section of the charter of the Mobile & North-western Railroad Company had been dispelled by the authoritative utterance of this court, and the legislature was willing for the immunity to stand as before until a future day, when it should see proper to put an end to it. Favor had been shown to the Natchez, Jackson & Columbus Railroad Company, and it was intended that it should be as before in the hands of a purchaser, or in union with the Louisville, New Orleans & Texas Railway Company. It was known the state would lose nothing, and it was supposed that the interest of the state would be promoted by a transfer as authorized.

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We approve the doctrine so well put in *Tennessee* v. *Whitworth*, 117 U. S., 139, and find it much more applicable to this case than *Railroad* v. *Maine*, 96 U. S., 499, is.

If the words "rights, privileges and immunities," used in the act of 1890, authorizing sale or consolidation of the Natchez, Jackson & Columbus Railroad Company, do not include its immunity from taxation, it would be difficult to pass it, except by an express declaration that exemption from taxation should be among the rights, privileges and immunities to be transferred. Especially must these words be held to include the immunity from taxation when they are the very words used in the act of the legislature by which the immunity granted by the twenty-first section of the charter of the Mobile & North-western Railroad Company was extended to the Natchez, Jackson & Columbus Railroad Company and other companies. Laws 1870, p. 327.

We think it clear that the immunity possessed by the Natchez, Jackson & Columbus Railroad Company was not lost by its sale and consolidation, which was expressly authorized, and that, as to this, every thing remained as before.

By their charters, the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railway Company were empowered to consolidate, and the immunity claimed by the Louisville, New Orleans & Texas Railway Company, for the right to pay the taxes on what was the Natchez, Jackson & Columbus Railroad Company, was not lost by its merger in the Yazoo & Mississippi Valley Railway Company, but it went into that company with all its rights, privileges and immunities as far as could be in the merger, and nothing was lost thereby, except as necessarily resulted from the union.

Section 181 of the constitution of 1890 has no effect as to the exemption claimed. It left the matter as if the constitution had not been adopted. It let it alone, to rest upon legislation, unaffected by the fundamental law.

The plea of former adjudication was bad. The suit in

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Statement of the case.

which a decree dismissing the bill was rendered and relied on as an adjudication, or as a pending suit, was fatally defective. The complainant could not take any benefit from it. It was founded on an affidavit pleaded as a tender for the taxes of 1891, which had no reference to the Natchez, Jackson & Columbus Railroad, but to a different one. The demurrer to the bill was rightly sustained on this ground, and the decree sustaining the demurrer and dismissing the bill in that case, now here on appeal, will be affirmed.

We reverse the decrees made in this case sustaining the plea and the demurrer, and dismissing the bill, and remand the case for further proceedings in the court below in accordance with this opinion. The defendant may answer within thirty days after mandate filed in the chancery court.

Reversed and remanded.

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BOARD OF SUPERVISORS OF LEE COUNTY v. GILBERT & BONNER.

COUNTY. *Liability for services to pauper. Emergency. Code* 1880, § 626.

Where no steps have been taken to declare one who is indigent and helpless a pauper, and, owing to his physical condition, he cannot be removed to the poor-house, but requires immediate surgical attention, which is bestowed in the emergency, the county is chargeable therefor. Code 1880, § 626.

FROM the circuit court of Lee county.

HON. LOCK E. HOUSTON, Judge.

Gilbert & Bonner, partners in the practice of medicine, made application to the board of supervisors of Lee county for an allowance of $55, as compensation for services in amputating the leg of a pauper. The allowance was refused, and an appeal was taken to the circuit court, where the case was tried by the court without a jury, resulting in a judg-

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Brief for appellants.

ment in favor of plaintiffs for the amount claimed, from which the county appeals.

The facts out of which the claim arose are these: In January, 1892, an old negro living in the county was, at that time, and had been for a long while, an object of charity, wholly dependent upon the public, and without relatives to whom he could look for support. He had previously lost one leg, and the remaining leg became badly ulcerated. Being reduced to a condition of great feebleness, he was permitted by the sheriff of the county to occupy one of the lower rooms of the jail. His condition grew worse, and appellees, having been called in, found that it was necessary to amputate the leg, which they did. Their testimony showed that immediate amputation was necessary; that, without it, there was no chance of recovery, and that, with it, the chances were meager. The old man survived the operation only about five days. Meantime, before his death, he was regularly declared a pauper by the board of supervisors. There was testimony that, some time before that, he had refused to go to the poor-house, but, at the time of the operation, and just before, his condition was such that he could not be removed.

Section 626, code 1880, which was in force at the time the services were rendered, is as follows: "The board of supervisors may allow, as far as may be deemed right, the claims of persons who have taken care of, fed, clothed, administered to or buried such paupers as were, at the time, proper subjects for relief, but could not be removed to the poor-house."

J. L. Finley, for appellants.

The proof shows that the old man could have been removed to the poor-house, if he had consented to be moved before he fell into the hands of the doctors. The attention of the board of supervisors had not even been called to his condition. The principle contended for by the counsel for appellees will apply wherever able-bodied men meet with accident

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or misfortune, and, being unable to pay physicians, have operations of this kind performed. *Reynolds* v. *Alcorn County*, 59 Miss., 132.

Clayton & Anderson, for appellees.

Section 626, code 1880, was intended to cover just such exceptional cases as this. See *Jones* v. *DeSoto County*, 60 Miss., 409. *Reynolds* v. *Alcorn County*, 50 *Ib.*, 132, recognizes that the allowance is proper wherever removal to the poor-house is impossible. Both reason and justice demand that the fee of appellees should be paid by the county. That this is a reasonable fee is admitted.

WOODS, J., delivered the opinion of the court.

The record presents one of the rare cases in which a surgeon's bill for services to a pauper is a proper charge against a county. It clearly appears that no steps had been taken by any county officer, or other person, to have the poor old man declared a pauper and removed to the poor-house, in the manner prescribed by law, or in any other manner. His pitiable condition rendered prompt action on the part of the surgeons necessary, and the dangerous state of the limb amputated made it impossible to remove him at the time to the county poor-house, regard being had to his life. Humanity demanded that what was done should be done, and then and there. It was a case of genuine emergency, in which the county should be held answerable for the fee. The fee is indisputably reasonable.

Affirmed.

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Statement of the case.

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JAMES H. NOLAN, ADM'R, v. GEO. R. SNODGRASS.

CHANCERY COURT. *Specific performance. Contract to convey. Limitation. Doing equity.*

Although defendants, whose ancestor contracted to convey land upon payment of the contract price, are barred by lapse of time from recovering either the land or the price from the purchaser, who entered under his contract, the representative of such purchaser, who relies on the bar of the statute of limitations, cannot invoke the aid of equity to cancel defendant's claim to the land, unless he offers to pay the balance of the purchase-money and interest. Such a suit, though in form one to cancel clouds, is one for specific performance, which will not be decreed unless complainant offers to perform his part of the contract.

FROM the chancery court of Yazoo county.

HON. H. C. CONN, Chancellor.

The lands in controversy were originally owned by William Gartley, who died in 1856, leaving the following children: William F., Margaret G., Lilla, Julia and Eugene Gartley, and two grandchildren, William G. and Mary J. Snodgrass, children of a deceased daughter, Mary F. Gartley, who had married Geo. R. Snodgrass. It is unnecessary, in view of the opinion, to consider the interest of any of the heirs except that of Margaret G. Gartley and that of William G. and Mary G. Snodgrass, who jointly inherited the one-sixth interest of Mary F. Gartley, their mother, subject, however, to the tenancy by the curtesy of their father, Geo. R. Snodgrass, who is still living.

Geo. R. Snodgrass, after the death of his first wife, married Margaret J. Gartley, her sister, and on April 5, 1885, they jointly sold to William F. Gartley their one-sixth interest in the land. This sale is evidenced only by a receipt, which is as follows:

"ST. JOSEPH, LA., January 29, 1859.

"Received of William F. Gartley the sum of $4,000, by sight-draft on Messrs. Lewis & Oglesby, of New Orleans,

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Statement of the case.

La., for amount $3,607.40, and $392.60 cash, in part payment for the undivided interest in that certain tract of land known as the 'Plainville Plantation,' situated in the county of Yazoo, and state of Mississippi, belonging to Margaret G. Gartley, wife of Geo. R. Snodgrass, and William G. and Mary Julia Snodgrass, children of Mary F. Gartley, deceased, former wife of Geo. R. Snodgrass, all of whom are legal heirs to the estate of William Gartley, deceased, late of Yazoo county, Mississippi; said sum of $4,000 being paid for said undivided interest in said land at the rate of $10 per acre, the balance to be paid in one year from date of this receipt."

It appears that in 1860 Geo. R. Snodgrass became the guardian of his said children, and, as such, obtained a decree to sell their interest in the land, and did sell it to William F. Gartley, and the sale was confirmed, but no deed was ever executed.

Margaret, the second wife of Geo. R. Snodgrass, died in 1866, leaving, as her heirs, three children—Owen, Estelle A. and Norah B. Snodgrass—who, at the time the bill in this case was filed, were aged, respectively, thirty-five, thirty-one and twenty-nine years. It will thus be seen that they jointly inherited the one-sixth interest of their mother, subject to the tenancy by the curtesy of their father, Geo. R. Snodgrass.

William F. Gartley entered into possession under his contract of purchase aforesaid, and remained in possession until his death, which occurred in 1890. Meantime, in 1872, partition was had of all the lands, and the interest claimed by William F. Gartley was set apart to him; but in this proceeding the above-mentioned children of Margaret G. Snodgrass, namely, Owen, Estelle A. and Norah B., were not made parties, and their interest in the land was not recognized. J. H. Nolan was appointed administrator of the estate of William F. Gartley, and, in the course of his administration, obtained a decree for the sale of the lands of the estate, to pay debts. This bill is filed by said administrator

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Brief for appellant.

against Geo. R. Snodgrass, Owen, Estelle A. and Norah B. Snodgrass, and William G. Snodgrass and Mary J. Wilson, *nee* Snodgrass, the children and heirs of Mary G. Gartley, seeking to cancel their claims to the lands of William F. Gartley. The bill alleges that the whole of the purchase-money due by William F. Gartley, the intestate, for the lands purchased by him from Margaret G. and Geo. R. Snodgrass, as evidenced by the foregoing receipt, had either been paid or the balance due was barred by limitation; that defendants had acquiesced in the possession of the land set apart to him in the partition proceedings, and that such possession had been adverse and continuous ever since the execution of the receipt in 1859. The bill alleges that therefore the title of William F. Gartley had become perfect, and that the claim of defendants was a cloud upon his title. This statement of the facts is sufficient to illustrate the only point passed on in the opinion of the court.

A decree *pro confesso* was taken against the heirs of Mary F. Snodgrass, the first wife of George R. Snodgrass. The other defendants answered, and, on final hearing, the court rendered a decree in favor of complainants, canceling the title of the defendants, except Owen, Estelle A. and Norah B., heirs of Margaret G. Snodgrass. It was decreed that they were entitled to a one-sixth interest in all the lands in controversy as heirs of their said mother, subject only to the life-estate of George R. Snodgrass, their father. From this decree Nolan, administrator of William F. Gartley, appeals.

R. Bowman, Sr., for appellant.

Margaret Snodgrass, jointly with her husband, sued for the contract price of the land. Specific performance will be decreed as to part of a contract, although there is no mutuality of remedy. Here there was mutuality of remedy; as the vendors of the land failed to sue for the price, it was their own laches. It is not denied that Gartley has been in open, adverse possession ever since his purchase, and it is not de-

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nied that appellees had notice of his adverse holding. They are estopped to assert title. *Dickson* v. *Green*, 24 Miss., 612.

Long possession of land raises a presumption of right, and is favored in courts. *Railroad Co.* v. *Bryan*, 8 Smed. & M., 234; *Nixon* v. *Carco*, 28 Miss., 414; *Railroad Co.* v. *Ragsdale*, 54 *Ib.*, 200.

Calhoon & Green, on the same side.

We submit that a reversal is unavoidable, since the court decreed for appellees that they had an undivided one-sixth interest in the land, without requiring them to account for or disgorge the $4,000 paid to their ancestors as part of the purchase-price. They should refund this or set it up as a claim against the estate, or ask to charge it as a lien on their interest in the land. They cannot keep the title always clouded by claiming the land and also holding the money. If appellees' mother had any right, it was, at most, to refund and rescind, or tender a deed and ask appellees for the unpaid balance of the price. *Ezelle* v. *Parker*, 41 Miss., 520; *Ferguson* v. *Bobo*, 54 *Ib.*, 121.

Barnett & Thompson, for appellees.

William F. Gartley could not acquire title against appellees by lapse of time. He was a vendee in possession before completing payment of the purchase-money. Under such circumstances, the statute of limitations does not run against the vendor. *Benson* v. *Stewart*, 30 Miss., 49.

COOPER, J., delivered the opinion of the court.

In effect, though not in form, this is a bill for the specific performance of a contract made by Mrs. Snodgrass to convey the title of the lands in controversy to appellant's intestate, without requiring payment of an unpaid part of the purchase-price. The complainant, it is true, does not ask to have the title conveyed by a deed, but he prays the cancellation of whatever claim may be asserted by her heirs at law,

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Opinion of the court.

as a cloud upon his intestate's title, the effect of which would be to invest their title, if any they have, in him. His claim is that the debt for the purchase-price is barred by limitation, wherefore, the title should be vested as though actual payment had been made.

For the purposes of considering this appeal, it may be conceded that Mrs. Snodgrass made a sufficient contract to convey the land, and that, by lapse of time, her heirs were precluded from recovering either the land or the purchase-price. If all this be conceded, it remains true that appellant could not invoke the interposition of a court of chancery without an offer to pay the unpaid purchase-money and interest, according to the contract of his intestate. There is no averment that the price has been in fact paid. The reliance of appellant is upon the fact that all remedy for the collection of the debt is barred by limitation, and that the bar of the statute is equivalent to payment. This position was denied in *Cook* v. *Reynolds*, 58 Miss., 244, in which case, the court, through Judge Campbell, said: "But, if the note was barred, that would not entitle the maker to a specific performance of the obligation to convey title on payment of the note. The bar of the statute of limitations is not payment. It is a defense against a demand for payment—an extinguishment of the right of action—but no lapse of time is an excuse for the non-performance of a condition precedent to the accrual of a right to call for performance by another of an act to be done on the performance of such condition."

The decree is affirmed.

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Statement of the case.

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WIRT ADAMS, STATE REVENUE AGENT, v. LORENZO FRAGIACOMO.

1. LIQUOR LICENSE. *Action therefor. State revenue agent. Code* 1892, § 1590.

Under the code of 1892, no action can be brought against one retailing intoxicating liquors without license, except as provided by § 1590 imposing penalties of $500 recoverable by the state, county and city, respectively. A suit by the state revenue agent, to recover the license tax which such retailer should have paid, is not maintainable. *McBride* v. *State*, *ante*, 716.

2. PRIVILEGE TAXES. *Action therefor. Code* 1892, § 3408.

Section 3408, chapter 1081, code 1892, authorizing suits for the recovery of delinquent privilege taxes, applies only to privilege taxes proper, as provided for by said chapter, and not to licenses to retail intoxicating liquors.

FROM the circuit court of the first district of Hinds county. HON. J. B. CHRISMAN, Judge.

This action was brought in October, 1892, by Wirt Adams, state revenue agent, against Lorenzo Fragiacomo, the appellee, to recover the amount of the licenses which he should have paid the state, county and city as a retailer of intoxicating liquors in the city of Jackson, during the years 1891 and 1892. The defendant demurred to the declaration, the demurrer was sustained and the suit dismissed, and the state revenue agent prosecutes this appeal.

Several questions are presented by the record and argued by counsel, but the opinion of the court is confined to the single preliminary inquiry whether this action is maintainable. In this aspect only the case has been ordered to be reported.

That part of § 3408, code of 1892, reference to which is made in the opinion, is as follows: "Any one failing to pay the privilege tax herein imposed, and to obtain license as herein required, but pursuing the business taxed without

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Brief for appellant.

such license, may be proceeded against by suit for such tax, besides being dealt with criminally."

Prior to the code of 1892, the matter of license to sell intoxicating liquors in the city of Jackson was regulated by the special act approved March 9, 1888. Laws, page 237. Section 1 of said act provides "that the state tax for license to sell in any quantity vinous or spirituous liquors in the city of Jackson, in the county of Hinds, state of Mississippi, shall not be less than one thousand dollars nor more than fifteen hundred dollars per annum."

Section 2 provides "that the state tax for license to sell malt liquors . . . . shall not be less than five hundred dollars nor more than seven hundred and fifty dollars per annum."

Williamson & Potter, for appellant.

1. If there ever existed a technical difference under our statutes between a privilege tax and a license tax, it is not recognized in our present code, in which the retail license to a liquor-dealer is called a *privilege* license. Code 1892, § 1582.

2. The right of the state to recover the amount of license which a retailer of intoxicating liquors should have paid has existed since the adoption of the code of 1880. This policy was enlarged upon by the legislature of 1890, and penalties fixed upon the officer wilfully failing to discharge his duty in collecting the license. Section 3408, code 1892, is a reproduction of § 594, code 1880, which gave the state the right to recover, by suit, delinquent privilege taxes, with this enlargement, however, that it includes the cause of action given by § 1109, code 1880. Under § 3408, code 1892, the right of the state to sue in this case cannot be doubted. Delinquent liquor-dealers are no more exempt from suit than those engaged in better callings.

The act of 1888 terms the license a state *tax* to sell vinous and spirituous liquors. This act remained in force until the adoption of the dram-shop chapter of the present code, April 2, 1892. The act of 1890, as to revenue agent, expressly con-

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Brief for appellee.

ferred on that officer the right to sue for privilege taxes. Section 4191, code of 1892, makes it the duty of the revenue agent to bring suit for all past-due taxes, including privilege and license taxes. It was competent for the legislature to declare in what manner, and by what persons, existing rights of action in the state or a municipality may be prosecuted. *McBride* v. *State*, *ante*, p. 716.

Calhoon & Green, for appellee.

There is no declaration in the code of 1880 that the person conducting the business of a retailer without license shall be liable to pay the price fixed by the local authorities therefor. He does not become a delinquent tax-payer. *State* v. *Adler*, 68 Miss, 487. It will be noticed that § 4192, code of 1892, omits any reference to license taxes, but confines the right of assessment to *ad valorem* taxes, or privilege taxes. So the language of the two acts creating the revenue agent is substantially the same, and both deny the power of assessment in a case like this. Under the act of 1890, the unlawful retailer is civilly liable for the highest amount he should have paid, but the action was not maintainable by the state revenue agent. *State* v. *Taylor*, 68 Miss., 730; *State* v. *Thibodeaux*, 69 *Ib.*, 92. The act of 1890, which created a cause of action against retailers, was, by implication, repealed by the code of 1892. So, when this action was begun, the sole statutory power of the revenue agent existed under the code of 1892. He could not maintain an action against an unlawful retailer for any act done prior to the code of 1892, even if he could do so under that code. *State* v. *Hill*, *ante*, p. 106. The only right of action conferred by that code exists under § 1590 for the recovery of the penalties of five hundred dollars therein imposed. And these penalties cannot be recovered by the state revenue agent. *McBride* v. *State*, *ante*, p. 716.

Section 3408, code of 1892, conferring a right of action for privilege taxes, does not apply to license taxes required of retailers of intoxicating liquors. We submit that when this

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suit was brought there was no civil action of any kind maintainable by the state revenue agent in cases like this.

WOODS, J., delivered the opinion of the court.

Has the revenue agent the authority to maintain this action? The answer will be found to have already been made in several recent opinions of this court. In the case of the *State* v. *Order of Elks*, 69 Miss., it is declared that the second section of the act of February 24, 1890, was repealed by the general revenue law, chapter 116, code of 1892. (It will be seen, in the opinion in this case, page 897, 69 Miss., that § 2, act of February 24, 1890, is said to have been repealed by the chapter of the code of 1892, entitled "Revenue Agent;" but it is clear that, by some inadvertence, these words, "revenue agent," are erroneously used, and that reference was had to chapter 116, entitled "Revenue." The mere verbal inaccuracy, however, is so manifest that the legal reader will not be misled.)

In the case of *State* v. *Hill*, *ante*, p. 106, it is held that the act of February 22, 1890, creating the office of revenue agent, was repealed by chapter 126, code of 1892, entitled "State Revenue Agent."

The authority of the state revenue agent to maintain this action must be found now in the code of 1892. The only action to be found in this code maintainable against persons selling liquors unlawfully, is in § 1590, in which it is provided that every person so offending "shall be subject to pay to the state, county and the city, town or village where the offense was committed, each, the sum of five hundred dollars," etc.

In *McBride* v. *State*, *ante*, p. 716, it is held that this sum of five hundred dollars was a penalty recoverable only by civil suit by the state, county or city, town or village, and not by the revenue agent.

It is useless to elaborate, for, on the authority of the cases hereinbefore named, it is settled that the action against appellee cannot be maintained by the state revenue agent.

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Syllabus.

Counsel for appellant are in error in supposing that § 3408, code of 1892, confers authority for maintaining civil actions against persons selling liquors without paying the license tax required in such cases. The section named is part of chapter 108, code of 1892, which treats of and deals with privilege taxes as distinguished from a license tax to retail liquors. In the privilege taxes enumerated and provided for in that chapter, the license tax of a retail liquor-dealer is not to be found, and the proceedings, civil and criminal, provided for in the concluding sentence of said section are applicable only to the delinquent privilege tax-payers, whose callings are taxed under said chapter 108.

Affirmed.

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88 652

D. E. EDWARDS v. WILLIAM HILLIER ET AL.

1. VENDOR AND VENDEE. *Bona fide purchaser. Notice to attorney.*

A purchaser of land, having a bond for title, is chargeable with notice of an adverse claim thereto received by his agent or attorney who files for him a bill for specific performance, and who pays the purchase-money, and procures the deed.

2. ESTOPPEL. *Void sale by trustee. Discharge of incumbrance.*

Where a husband, having conveyed land to a trustee to hold in trust for his wife, afterwards, under alleged authority from the trustee, makes an unauthorized sale thereof, the mere fact that he applied a part of the purchase-money to discharge an incumbrance on the property made by the wife, will not estop her to recover the land.

3. CHANCERY PLEADING. *Affirmative defense. Cross-bill. Subrogation.*

In such case, the extent of the purchaser's right, if any, is subrogation to the claim of the incumbrancer, but, on a bill by the wife to cancel his claim, the right to subrogation, being affirmative, must be asserted by cross-bill.

4. CONVEYANCE OF LAND. *Subsequently acquired title of grantor. Estoppel.*

Where one, owning only an undivided interest in land, conveys it by a deed purporting to pass the entire interest, and afterwards acquires the

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Statement of the case.

interest of his co-owner, the title thus acquired inures *eo instanti* to his grantee; and it makes no difference that his deed to the purchaser contained a misdescription of the land, this having, meantime, been corrected by decree.

FROM the chancery court of Webster county.

HON. BAXTER MCFARLAND, Chancellor.

Appellant, Mrs. D. E. Edwards, exhibited this bill July 29, 1891, against William Hillier and J. W. Hays, seeking to cancel their claims to certain land, which the bill alleges are clouds on her title. Complainant claims under a conveyance from her husband, G. W. Edwards, executed August 20, 1874, whereby he conveyed the land to one Hubbard, "in trust to protect and defend the estate granted," for his wife, the said D. E. Edwards. This conveyance authorized the said trustee, among other things, to execute any needed powers of attorney to further the purpose of the conveyance. Under color of authority thus conferred, Hubbard executed a power of attorney to G. W. Edwards, the husband and grantor, and thus the title stood until 1879, when G. W. Edwards contracted to sell the land to defendant, William Hillier, for the sum of $350, to be paid. Hillier received from Edwards his bond to make title upon the payment of said sum, and entered into possession of the land, and began to clear it for cultivation. The purchase-money was not paid, and for several years Hillier contracted to pay rent, if he should fail to pay the purchase-money, and executed notes accordingly. The rent was paid, but Hillier retained, during all of this time, his bond for title, and remained bound for the purchase-money. In 1889 he tendered to G. W. Edwards the amount thereof, and demanded a deed, which being refused, he filed a bill for specific performance. Mrs. Edwards, the appellant, was not a party to that suit. It was finally settled, and, in 1890, G. W. Edwards executed a deed to Hillier, and the note was paid to the attorney of record of G. W. Edwards. There was some testimony to show that this attorney was also the attorney for Mrs. D. E. Edwards, employed by

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Brief for appellant.

her to represent her interest, but as to this the evidence is contradictory. With a part of the money thus paid, the said attorney discharged a trust-deed on the land, previously executed jointly by Mrs. Edwards and her husband. In order to obtain the money so paid in purchase of the land, Hillier executed a trust-deed thereon, which was assigned to defendant, Hays.

The defense mainly relied on by Hillier is adverse possession. As to this, much testimony was taken, but in view of the admitted fact that he entered under a bond for title, and did not pay for the land and receive a deed until 1890, before which time his title could not be adverse, it is not necessary to set out the evidence as to the character of his possession.

The defendants also set up that G. W. Edwards, at the time he executed the conveyance for the benefit of his wife, the complainant, owned only a half-interest in the land, it having been devised by his father to him and his brother, E. D. Edwards, jointly. It was, however, shown that the interest of E. D. Edwards had been sold under execution, and bought by one who conveyed to G. W. Edwards in 1888, and the title thus secured the court holds inured to his wife, to whom he had previously conveyed the land. It only remains to be stated that the deed from G. W. Edwards to complainant contained a misdescription of the land, which was situated in a range different from that stated in the deed, but the evidence showed that, in a chancery suit brought by Mrs. Edwards and Hubbard, her trustee, against G. W. Edwards, this mistake had been corrected.

On final hearing, the court, being of the opinion that complainant had title to only half of the land, canceled the claims of defendants to that extent, but no further. From this decree both parties have appealed.

Leverett & Gore and *R. C. Beckett*, for appellant, D. E. Edwards.

It is needless to argue that the deed from G. W. Edwards

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Brief for appellees.

to Hubbard, in trust to protect and defend the estate, gave him no power either to sell it or to authorize another to sell it.

Prior to 1890, when Hillier paid the purchase-money and received his deed, his possession was not adverse. *White* v. *Tucker*, 52 Miss., 145.

It is immaterial whether G. W. Edwards, the common source, owned the entire interest in the land or only a half-interest. He conveyed the entire interest to his wife, and afterwards, at execution sale, obtained the interest of E. D. Edwards, his alleged co-owner. This title inured *eo instanti* to his wife. Code 1871, § 2300; Code 1880, § 1175. Besides, both parties claim from a common source, and neither can dispute its validity. *Peoples Bank* v. *West*, 67 Miss., 729.

Fox & Roane, for appellees, Hillier and Hays.

1. The deed from G. W. Edwards to his wife did not convey the lands in controversy. It is true she obtained a decree of court correcting the alleged misdescription, but this was a mere family affair, and these defendants were not parties to that proceeding. Besides, Hillier had purchased the land before that decree was rendered, and was in possession under his contract. He had also made a tender of the purchase-money, and demanded a deed, and, this being refused, had filed his bill for specific performance.

2. The conveyance to Hubbard in trust for Mrs. Edwards, conferred on him power "to do every act which Hubbard could do if personally present." The legal title was in Hubbard. He had the power of sale, and granted that power to Edwards, who sold to Hillier. We think the evidence shows that Mrs. Edwards herself received the purchase-money. Certainly a part of it went to discharge an incumbrance on the land. She is, therefore, estopped to set up against Hillier and Hays any title she may have.

3. The evidence fairly establishes adverse possession in Hillier for more than ten years before the suit was begun. Certainly either he or Edwards, his grantor, was in possession,

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and the possession of either is effectual. Since defendant, Hillier, relies on adverse possession, he is not estopped to deny the title of G. W. Edwards as being the source of his title.

COOPER, J., delivered the opinion of the court.

The evidence is insufficient to establish an adverse possession by the defendant, Hillier for the time required by law to perfect his title, and so the chancellor held, in which conclusion we concur. We also concur with him in the view that no sufficient evidence appears by reason of which Mrs. Edwards should be estopped from asserting her title to the land sued for. The attorney of Hillier, to whom the settlement of the controversy between Hillier and G. W. Edwards was intrusted, and who paid the purchase-money for the lands, and received the conveyance from G. W. Edwards, testified in this cause that he knew that Mrs. Edwards then claimed to own the land. Why, under such circumstances, he accepted a conveyance from G. W. Edwards, is not explained. But Hillier is certainly bound by the notice which was given to his agent and attorney. The mere fact that a part of the purchase-money went to discharge an incumbrance on the land executed by her, the payment being made by her husband, does not estop her to claim the land. The extent of the right of the purchaser, Hillier, if any, would be to secure subrogation to the claim of the mortgagee, whose debt was paid; but this relief is affirmative in its nature, and there is no cross-bill in the cause under which it could have been awarded by the court.

Upon the appeal of Mrs. Edwards, the decree must be reversed. By his conveyance to Hubbard, the trustee for Mrs. Edwards, G. W. Edwards attempted to convey the entire interest in the land. There was a misdescription as to the range in which the land lies, but this was corrected by a decree of the chancery court before G. W. Edwards conveyed the land to Hillier. If it be true that, when he made the con-

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veyance to Hubbard, he only owned an undivided one-half interest in the land, and afterwards acquired the other interest under execution sale against the owner, his brother, the title so secured passed *eo instanti* under his former conveyance. *Kaiser* v. *Earhart*, 64 Miss., 492; *McInnis* v. *Pickett*, 65 *Ib.*, 354; *Bramlett* v. *Roberts*, 68 *Ib.*, 325. There was therefore no title to any interest in the land in him at the date of the conveyance to Hillier.

The decree is affirmed on the appeal of the defendants, and reversed upon that of the complainant.

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MERIDIAN FAIR & EXPOSITION ASSOCIATION *v.* NORTH BIRMINGHAM STREET RAILWAY COMPANY.

1. BAILMENT. *Action for non-return. Destruction. Negligence. Burden of proof.*

The law does not presume negligence. When a bailee in an action for non-return of an article borrowed shows that it was destroyed by fire, under circumstances fully disclosed, and not suggestive of any want of proper care, it devolves on the bailor to turn the scale by some evidence inculpatory of the defendant.

2. SAME. *Property destroyed by fire. Guaranty. Liability.*

An æronaut contracted with the defendant, a fair association, to give balloon ascensions, and applied to plaintiff to borrow a balloon. Plaintiff knew him to be an experienced aeronaut, but, considering him unreliable financially, refused the loan, whereupon defendant guaranteed the return of the balloon, and plaintiff delivered it, in good condition, to the aeronaut. While in use in filling the engagement, it was destroyed by fire, originating in some inexplicable way. There was no evidence of negligence. *Held*, there was no guaranty as to care or skill in the *use* of the balloon, or as against accident, but only that it would be returned after use, and plaintiff could not recover.

FROM the circuit court of Lauderdale county.

HON. S. H. TERRAL, Judge.

Appellant, the Meridian Fair & Exposition Association, at its exhibition in 1890, had contracted with one Fisk to make

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Statement of the case.

a number of balloon ascensions for the entertainment of its visitors. In order to have what is called a race, it was necessary to have two balloons, which Fisk was to furnish. He applied to appellee, the North Birmingham Street Railway Company, for whom he had made some ascensions, to borrow a balloon to be used for the purpose stated. He showed the manager of the railway company the contract between the fair association and himself, and explained to him that the proposed balloon ascension had been advertised, but that, unless he could borrow a balloon, the ascension would not take place. The record does not show that this interview was known to the fair association at the time. Fisk was regarded as financially irresponsible by the manager of the railway company, and he refused to lend him the balloon without security for its return. Thereupon, at the suggestion of Fisk, the following telegram was sent to appellant:

"BIRMINGHAM, ALA., October 9, 1890.

"*George M. Hodges, Secretary, Meridian:*

I will let I. N. Fisk have a balloon to use at Meridian on condition that you will be responsible for its being shipped back to me. Answer if you will be responsible.

RANDOLPH PEYTON,
General Manager."

The following telegram was received in reply:

"MERIDIAN, MISS., October 9, 1890.

"We will be responsible.

G. M. HODGES, *Secretary.*"

There was no further communication, and, thereupon, the general manager of the railway company, as an accommodation to Fisk, shipped the balloon, in good condition, to him at Meridian, and he proceeded with the ascension on the grounds of the fair association. When the balloon had ascended some distance above the ground, it took fire in some unexplained way, and was destroyed.

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Brief for appellee.

Afterwards, the manager of the railway company applied to appellant for the return of the balloon, and was informed that it could not be returned, because it had been destroyed by fire. No explanation was offered as to the cause of the fire. Thereupon, this suit was brought by appellee to recover of the fair association the value of the balloon. A jury trial was waived, and the case was tried by the court. On the trial, the above facts, substantially, were shown. Fisk was not examined as a witness. There was no testimony showing the cause of the fire. Witnesses who saw it, could not explain its origin. From a judgment in favor of plaintiff, this appeal is taken. The opinion contains a further statement of the case.

McIntosh, Williams & Russell, for appellant.

Appellant had no contract with plaintiff for the use of the balloon. It had contracted with Fisk, and appellee loaned the balloon as an accommodation to him. Appellant's obligation was simply to return it after it had been used.

It is not even shown that there was any negligence on the part of Fisk, and this was necessary to establish liability as against defendant. Schouler on Bailments, § 23; Story on Bailments, § 410.

But the burden of proof was on plaintiff to show negligence of the fair association. Story on Bailments, §§ 278, 410; Schouler on Bailments, § 23, and authorities there cited.

Miller & Baskin, for appellee.

1. Appellee, by its telegram, agreed absolutely for the return of the balloon. The failure to return it fixed liability. Where a party, by contract, creates a charge upon himself, he is bound to make it good, if he may, notwithstanding any accident, because he might have provided against this. *School District* v. *Dauchy*, 68 Am. Dec., 371.

Where property is placed in a bailee's hands in good condition, and is not returned, the burden of exculpation is upon

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him, especially if the loss cannot ordinarily occur without negligence. The bailor must make out a *prima facie* case by showing the delivery of the thing in good condition, and the bailee's failure to redeliver. The *prima facie* case being made out, the inference is then deducible that the bailee is to blame. In such case, it rests upon the bailee to exonerate himself by showing that he was not negligent. Schouler on Bailments, § 23 *et seq.*, and authorities cited; *Ford* v. *Simmons*, 13 La. Ann., 397; *Collins* v. *Bennett*, 46 N. Y., 490.

The defendant should have returned the balloon or given some reason why it could not do so; failing in this, it was liable. Story on Bailments, §§ 278, 411, 529. It gave no excuse, but merely answered that the balloon had been burned, and this, too, notwithstanding the facts in reference to the burning were within its knowledge. It could have easily shown the facts. Its failure to do so was an implied admission that it had not exercised proper care. *Boies* v. *Railroad Co.*, 37 Conn., 272; *Lichtenheim* v. *Railroad Co.*, 11 Cush. (Mass.), 70. The judgment should be affirmed.

CAMPBELL, C. J., delivered the opinion of the court.

The balloon was loaned by its owner to enable the aeronaut, Fisk, by its use, to carry out his engagement with the appellant. The owner was not willing to trust Fisk for the return of the balloon, and required the appellant to become responsible for its return, and, receiving this guaranty, the balloon was loaned for use by Fisk in execution of his contract with the appellant, which was in writing, and had been inspected by the owner of the balloon. While being thus used, it was destroyed by fire occurring in an ascension, one hundred and twenty or thirty feet above the earth, from some cause not explained. The just interpretation of the obligation assumed by the appellant for the return of the balloon is that it was subject to the implied condition that, if it was destroyed in the use for which it was loaned, the obligation should be discharged. It was destroyed by fire, in an ascen-

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sion caused by Fisk, who was known to the loaner of the balloon to be an experienced person at the business, and to whom it was willing to intrust it, with a responsible guaranty for its return after the contemplated use. The suggestion is that the apprehension was, not that any harm would result from the use of the balloon, but there was danger of failure to return it to its owner after use. Hence, the guaranty, not against destruction or accident in its use on the occasion for which it was loaned, and by the person for whose use it was procured, but for its return afterwards. The assumption of the appellant was not for the skill or care of Fisk in using the balloon, but only for its return after its use. The risk of its use was not assumed by the appellant. That was taken by the owner who intrusted it for Fisk's use, only requiring the obligation of appellant for its return after the contemplated use of it.

While in use by Fisk, on the occasion for which the loan was made, it was destroyed by fire originating in some inexplicable manner. This was clearly shown, and there is no hint in the evidence of any culpability of Fisk or anybody else, unless the mere fact of fire raises a presumption of negligence. It does not, and, if the appellant was held bound for want of skill or care of Fisk in using the balloon, the plaintiff has not shown a right to recover, for the destruction of the balloon by fire is shown, and there is nothing in the circumstances of which to predicate blame on anybody.

When a bailee in an action for non-return of an article shows that it was destroyed by fire under circumstances fully disclosed, and not suggestive of any want of due care, it devolves on the bailor seeking to hold him responsible to turn the scale by some evidence inculpatory of the defendant. The law does not intend or presume negligence. It does make the reasonable requirement of the bailee, who fails to return the thing bailed, to show that he cannot return it, and why; and when he discloses fully the fact showing the impossibility of a return because of the destruction of the thing,

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with the attendant circumstances, and nothing connected with his showing in this respect inculpates him, the plaintiff must show liability or fail in his action. 2 Kent's Com., *587; Story on Bailments, §§ 410, 411, 412, 454; Schouler's Bailments, p. 23 *et seq.*; 2 Am. & Eng. Enc. L., p. 59; 24 Am. Dec., 143, and note on p. 150 *et seq.*; *Mills* v. *Gilbreth*, 47 Maine, 320.

Upon the facts disclosed, as shown by the record, the defendant sufficiently accounted for the non-return of the balloon, and the plaintiff was not entitled to recover.

Reversed, and remanded for a new trial.

REBECCA J. YOUNG ET AL. *v.* JULIA M. WALKER.

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1. LIMITATIONS. *Bill of review. Dismissal. New suit. Code* 1880, §§ 2681, 2686.

Where a bill is filed by a ward, within two years after majority, to review a partition of land in which she was interested, made during minority, and also to surcharge the accounts of her guardian, and at the hearing, because of multifariousness, the bill is dismissed as to the partition without prejudice (relief being given as to the guardian's accounts), this is a dismissal for a "matter of form" within the meaning of § 2686, code 1880, and a new bill to review the partition proceedings may be filed within one year thereafter.

2. ESTOPPEL. *Partition. Infant. Receiving proceeds.*

Where an infant owns an interest in land, a part of which is allotted to her by partition, and this is sold by her guardian, who, after her majority, accounts for and pays over to her the proceeds of sale, she will be estopped from afterwards questioning the legality of the partition proceedings and claiming an interest in the remainder of the land. *Handy* v. *Noonan*, 51 Miss., 166.

3. SUPREME COURT. *Motion to vacate decree. Correct result.*

Where, on a bill to vacate a decree for partition and recover certain land, a decree in favor of complainant is reversed by the supreme court and the bill dismissed, on the ground that she is estopped by having received the proceeds of sale of part of the land allotted to her, and afterwards,

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Statement of the case.

though it is made to appear that certain receipts, showing payment of such proceeds to her, were improperly in the record, a motion to vacate the decree of reversal will be overruled, if the court is of opinion, from the record, without considering the receipts, that complainant did receive the proceeds of sale, and is not entitled to relief.

FROM the chancery court of Lauderdale county.

HON. W. T. HOUSTON, Chancellor.

Appellee, Julia M. Walker, was, prior to 1874, the owner of an undivided one-eighth interest in a tract of land in Lauderdale county, containing 720 acres, which was divided, by partition proceedings in the chancery court of said county, between herself and her brothers and sisters, the other owners, in 1874, while she was a minor. An undivided one-half interest in that part of the land lying south and west of Oktibbeha creek, containing 157 acres, was allotted to her in the partition. The bill in this case was filed by her, alleging various irregularities and illegal steps in said partition proceedings, and claiming that the same were void. Among other things, the bill alleges that the half-interest in the land south and west of the creek, which was allotted to complainant, was of greatly less value than one-eighth of the whole tract, and the alleged gross inequality of the division was made a ground of attack on said partition proceedings. The brothers and sisters of complainant, and purchasers from them of certain portions of the land, are made parties defendant.

The bill prays that the partition of said land be declared void and set aside, and that complainant's title to a one-eighth interest in all of said land lying north and east of Oktibbeha creek should be ascertained and set apart to her, and that the defendants be held liable for her proportion of the rents, and her interest in the timber cut from the land.

To estop complainant, the defendants, in their answer, set up various facts, which are alluded to in the opinion of the court. They also pleaded the statute of limitations of two years against filing a bill of review.

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Statement of the case.

The record shows that the decree in the partition proceedings was rendered October 10, 1874, and that complainant became twenty-one years old August 17, 1885; that, on August 14, 1886, she filed her bill against appellants and others, seeking to review said partition proceedings, and to set aside a sale made by her guardian of the interest which had been allotted to her in said proceedings, the guardian having sold the same without compliance with the statute as to giving bond. That bill also sought to cancel a tax-title acquired by one Weiss, the purchaser at said guardian sale, and to review, surcharge and falsify the accounts of her said guardian. The interest allotted to complainant was sold by her guardian under a decree of the chancery court, in the year 1878, Weiss, the purchaser, paying the purchase-money, $350, and taking possession of the land under a deed from the guardian. He is not made a party to this suit. In the original case brought by defendant, wherein she filed her bill, as above stated, August 14, 1886, a final decree was rendered January 18, 1889, among other things, reciting as follows: "It is therefore ordered, adjudged and decreed by the court that the bill be, and the same is hereby, dismissed as to said suit and proceedings for partition of said lands, without prejudice, and also as to said petition and proceedings for the sale of said half-interest in said land without prejudice, and that said bill be, and the same is hereby, retained as to so much thereof as seeks to review the guardianship accounts and annual and final settlements of the defendant, Joshua McLemore, guardian of the complainant." And relief was granted as to the accounting.

The bill in the present case was filed November 15, 1889. Numerous issues were raised by the answer of the defendants, and testimony was taken at great length. Among other things, the evidence tended to show that the one-half interest in the land west of Oktibbeha creek, allotted to complainant in 1874, was only equal in value to an undivided one-sixteenth interest in the whole tract.

The chancery court held that the partition proceedings

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Brief for appellants.

were void; that complainant was not estopped; that she was not barred, and a decree was entered in her favor for an undivided one-sixteenth interest in the land north and east of the creek. From this decree defendants appeal. The opinion contains a further statement of the case. As the court disposes of the case on the question of estoppel, it is unnecessary to set out the evidence or the argument of counsel in respect to the alleged illegality of the partition proceedings.

Section 2681, code 1880, provides that bills of review shall be filed within two years after the date of the decree, saving to persons under disability the period of two years after the removal of such disability. Section 2686 provides that if in any action, duly commenced within the time allowed, the writ shall be abated or the action defeated for a matter of form, a new action may be commenced at any time within one year after the abatement or determination of such suit.

Walker & Hall, for appellants.

1. Complainant's one-eighth interest in the 720 acres of land was set apart to her by the partition in 1874, and was thereafter sold by her guardian. The validity of that sale cannot be successfully questioned, for after twelve months the purchaser had a perfect title. Code 1871, § 2173; Code 1880, § 2693; *Morgan* v. *Hazelhurst Lodge*, 53 Miss., 665; *Hall* v. *Wells*, 54 *Ib.*, 289; *Summers* v. *Brady*, 56 *Ib.*, 10; *Jeffries* v. *Dowdle*, 61 *Ib.*, 504.

Complainant's interest in the land now being vested in Weiss, she has no right to question the partition proceedings as to the remainder of the land. One who is not interested, cannot maintain a bill of review. 2 Am. & Eng. Enc. L., p. 263, § 2, note 6; 1 Tenn. Chan., 173.

2. It devolves on one seeking to vacate a partition, first to restore the *status quo*. Complainant does not even offer to bring into court the money derived by her from the sale of her interest in the land. Accepting the money was a ratification of both the partition suit and the guardian sale.

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Brief for appellee.

3. Complainant is barred by § 2681, code 1880, limiting the time in which a bill of review may be filed to two years after the removal of disabilities. The effect of the dismissal of the first bill was only to prevent the decree from being set up as a bar in another suit. *Railroad Co.* v. *Davis*, 62 Miss., 271.

The suit was not dismissed for a matter of form, and therefore the case does not fall within the provisions of § 2686, code 1880. The bill was not dismissed for multifariousness, but was retained as to certain matters, and was merely dismissed without prejudice as to the others.

Witherspoon & Witherspoon, for appellee.

1. The bill was not filed within two years after complainant had reached her majority, but the record shows that in less than one year after she became of age she filed a bill to review the decree in the partition suit, which bill was dismissed in 1889, without prejudice, for a matter of form. The matter of form was that she could not litigate the subject-matter of the partition suit with other matters joined in her bill. For this reason only it was dismissed, and the dismissal was without prejudice. If it had been dismissed on the merits, or for any other reason than a matter of form, it would have been dismissed absolutely and not without prejudice.

2. Appellants insist that complainant is estopped to claim an interest in the land east of the creek. This is based on the fact that her guardian, assuming that the partition was valid, and that complainant had a one-half interest in the land west of the creek, sold the same as her property, and charged himself, as guardian, with the proceeds. To this there are two answers. First, it is not shown that the complainant ever received this money from the guardian. This is fatal to the estoppel. The guardian's sale was void. If appellee was suing for her interest in the land west of the creek, she would not be estopped as to that without proof that she had received the purchase-money after she was twenty-one

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years old. That this is necessary to work an estoppel, has been held in many cases. If appellee would not be estopped from asserting title to the land west of the creek, *a fortiori*, she is not estopped from asserting her title to the land east of it. Again, if appellee had received the $350 from her guardian, she would not be estopped to assert title to the land east of the creek. The guardian could not, by selling a greater interest than appellee had west of the creek, estop her from claiming her property east of it.

The question of estoppel can only arise on the theory that the partition decree was valid. If it was valid, appellee has no case. If it was void, she is equitably entitled to a one-sixteenth interest instead of a one-eighth interest. The decree should be affirmed.

Argued orally by *G. Q. Hall*, for appellants.

CAMPBELL, C. J., delivered the opinion of the court.

The bill was filed in time, but the complainant, having received the proceeds of the sale by her guardian of what was set apart to her in the partition suit, must be held estopped afterwards to question that proceeding. Whatever may be said of the partition suit, it resulted in partitioning the 720 acres of land, and assigning as the share of complainant a half-interest in that part of the tract south and west of Oktibbeha creek. This half-interest thus set apart to the complainant, as her share of the whole tract, was sold by her guardian, and the proceeds of the sale accounted for by him, and, since attaining her majority, and, as must be assumed, with full knowledge of all the facts, she has held her former guardian accountable for this very money, obtained a decree against him made up in part of this sum, and received satisfaction of it. It is not admissible to treat her as still entitled to a partition of the lands on the other side of the creek. The half-interest set apart for her was for her share of the whole tract, and, having received the money for which that

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was sold as hers, she cannot now go for any of the land. She must be held to have ratified the partition, since she claimed and received the fruits of it in the manner stated. *Handy* v. *Noonan*, 51 Miss., 166.

Decree reversed, and bill dismissed at the costs of the complainant in this and the chancery court.

Afterwards, *Witherspoon & Witherspoon*, on behalf of appellee, filed a motion, supported by affidavits, to show that certain receipts alleged to have been given by appellee to her guardian, which were embraced in the record, were improperly copied therein; that the said receipts were offered in evidence on the hearing of the case, but, on motion of complainant, were excluded, on the ground that there was no evidence to identify the same or to show their execution. Further, in support of this motion, it was shown that counsel for appellee were not aware, until after a reversal of the decree, that these receipts had been improperly embraced in the record, and a perfected transcript of the record was filed. A brief in support of this motion was filed, but, in view of the opinion, it is not necessary to give this. Counsel for appellee also filed a suggestion of error, discussing the evidence at length, and making the following points:

1. The record does not disclose that complainant claimed or received the proceeds of the sale of the land west of the creek, as stated in the opinion. The court was evidently misled as to this by the assertion of opposing counsel and the form by which the record was made up. The alleged receipts were papers copied in the record without any bill of exceptions, or without being identified in any proper note of evidence. As to this, see 1 How. (Miss.), 333; 3 *Ib.*, 172; 4 *Ib.*, 326; 4 Smed. & M., 431.

It is not true that appellee claimed the $350. On the contrary, she expressly repudiated the whole transaction out of which this sum arose. The sale was attacked as fraudulent and void. Unless the court indulges in presumptions favor-

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Response to the suggestion of error.

able to appellants, it does not appear that any part of the $350 was received by appellee.

2. At most, the appellee did not receive any more of the $350 than that portion which represented her interest in the land west of the creek. She had a right to receive that much, and could not be estopped by receiving her own. It is an erroneous application of the doctrine of estoppel to hold that, because she received the value of her own property, she is estopped to claim other property.

The case of *Handy* v. *Noonan*, 51 Miss., 166, cited in the opinion, decides that the receipt by a ward, after majority, of the purchase-money arising from a void guardian's sale is a bar "in the sense and to the extent of working an estoppel in equity against an assertion of the legal title." Under this, if Mrs. Walker had received the $350, she could not now assert the legal title to the land that was sold, because such receipt would be a confirmation of the sale. But to confirm such sale is not to admit that the interest in the land sold was all that she was entitled to receive. The proceedings being void, the case stands as if no partition had been made.

CAMPBELL, C. J., delivered the response of the court.

The motion is denied, not for want of power in the court to protect itself and litigants and do justice in the case made by the motion and affidavits (as to that we have no doubt), but because the conclusion heretofore announced as to the preclusion of Mrs. Walker to disturb the partition of the land after having received the fruits of it, is not so dependent on the receipts alleged to have been improperly put in the transcript as to be avoided if they were left out. An undivided half-interest in the land on the south and west of the creek was set apart as the full share of Julia (now Mrs. Walker), and it was dealt with as hers. Her guardian obtained an order of court, and sold it and got pay for it, and charged himself with the money, and that constitutes a debit in the decree obtained by Mrs. Walker in her proceedings to

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surcharge and falsify the guardian's accounts. That decree is against guardian and surety, as we suppose. If it has been satisfied, Mrs. Walker has received the money. If it has not been satisfied, it stands in her favor, and she will not be permitted to pursue the land in this condition of matters.

More than this, the decree rendered in this case, by the chancellor, in favor of Mrs. Walker, recognizes the fact that she has received the proceeds of the sale of her half-interest in the lands assigned her in the partition proceedings, and, denying her claim as to that, awards her a one-sixteenth interest in lands other than those. It thus appears that the decree rests upon the fact that the half-interest south and west of the creek had been sold as the property of Mrs. Walker, and the proceeds received by her, so as to estop her to claim as to that.

The error of the decree consists in allowing a recovery of part of the other lands, our view being that the half-interest in certain land having been set apart as her share of the whole, and that thus set apart having been sold by her guardian, and the purchase-money having been received by her, in the way stated above, she cannot now be heard to complain of the partition. We regret that any error or mistake should have occurred in making the transcript for this court, but are satisfied, from all that is presented, that this is a case for the application of the *beneficent* doctrine of estoppel, applied by our decision.

The affidavit of the chancellor, submitted in support of this motion, shows that the receipts for money, which the transcript on which we decided shows were in evidence, were objected to as not proved, and that evidence to prove their genuineness was offered and excluded. It is suggested by this, that the truth of the case is, that, by inadvertence of counsel, notice of a purpose to prove exhibits at the hearing had not been given, and hence the rejection of evidence to prove them. We are morally certain that Mrs. Walker has obtained a decree against her former guardian and his surety

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Statement of the case.

on his bond, and that the purchase-money of her half-interest in the land assigned as her full share in the partition proceedings constituted a debit of her guardian, and formed part of the decree she got surcharging his accounts, and that she has accepted satisfaction of that decree. If this be true, she is estopped to assail the partition. All we would be willing to do, in view of the alleged error in getting up the record and all the circumstances, is to reverse and remand for another trial in the chancery court, and then opportunity would be given to prove the exhibits complained of, and, on such proof, a decree would, according to our view, follow for the defendants, with exactly the result already reached.

Motion denied.

J. S. SOLOMON *v.* TUPELO COMPRESS CO.

APPEARANCE. *Form of plea. Effect. Judgment.*

Where an appellant claims that a plea (which is somewhat ambiguous in form) was intended only as an appearance for a co-defendant, if the plea as filed would have been sufficient to prevent a judgment by default against appellant, it will be treated as an appearance for him, and a judgment for plaintiff based thereon will be sustained.

FROM the circuit court of Lee county.

HON. LOCK E. HOUSTON, Judge.

On August 12, 1891, appellee instituted an action of assumpsit in the court below against R. G. Reading and J. S. Solomon. On August 12, 1891, process was returned by the sheriff of Lee county, executed as to Reading, and not found as to Solomon. Summons was also issued to Lauderdale county, which, on August 13, was returned executed as to the defendant, Solomon. On August 14, the following entry was made on the minutes of the court: "Came the parties by their at-

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Brief for appellant.

torneys, and, on application to the court, the defendant has, and is hereby given, leave to plead during this term."

On August 18, a plea was filed in the following words:

"TUPELO COMPRESS CO. v. R. G. READING AND J. S. SOLOMON. } And the said def't, by att'y, comes and defends the wrong, etc., and for plea in this behalf says: They did not undertake and promise in manner and form as the plaintiff hath alleged in their declaration, and of this they put themselves upon the country.

"J. L. FINLEY,
"*Att'y for Def't.*"

On February 15, 1892, the record recites that the parties came, by their attorneys, and that thereupon came a jury, which found for plaintiff, whereupon judgment was rendered against both defendants for $608 and costs. The defendant, Solomon, appeals. The only question considered by the court is, whether the above-mentioned plea was an appearance for both defendants. It is not necessary to make any further statement of the case.

Hamm, Witherspoon & Witherspoon, for appellant.

Only one of the defendants obtained leave to plead, and the plea relied on as an appearance shows on its face that it was by only one defendant. This must refer to the one who had been served with a summons, and who had obtained leave to plead. The plea not only shows in the beginning that it is the plea of "the said def't," but is signed "J. L. Finley, att'y for def't." There is no significance in the fact that the plural form is used in the body of the plea. We confidently submit, therefore, that the record fails to show any appearance by the appellant, Solomon.

If the record leaves it doubtful as to which defendant appeared, the doubt must be resolved in favor of appellant. The court cannot presume that the defendant who obtained leave to plead, and who appeared, was Solomon, because such

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a presumption would compel the court, in case Reading was trying to vacate the judgment, to presume that *he* was the defendant referred to. When the record is silent, the court may presume the facts necessary to uphold the judgment, but the court will not indulge in a presumption which would logically lead to a contradiction of the record.

Allen & Robins, for appellee.

The plea is that of both defendants. In it both are expressly named, and it is plural in form. Counsel on the other side, we fear, do not appreciate the learning, and especially the grammar learning, of the attorney who filed that plea. We are surprised that they contend that a plea containing so many plural pronouns and verbs could have been interposed by him for only one defendant. To charge that distinguished counsel would make such incorrect use of language, is to reflect upon the learning of the whole profession, and, if this court should sustain such charge, we believe it would bring on *war*.

It is immaterial that the learned attorney, in writing the plea, got tired before he finished it, and at the end used the abbreviation "def't" for defendants. It is too much to require a lawyer to write out every thing in full.

Aside from all this, it is established that where there are several defendants, and a plea is filed for a part of them, it must appear for whom; but, if the plea is plural in form, it will amount to an appearance for all the defendants, unless it otherwise affirmatively appears. *Jones* v. *Hunter*, 4 How. (Miss.), 342; *Henderson* v. *Hamer*, 5 *Ib.*, 525; *Miller* v. *Ewing*, 8 Smed. & M., 421; *Harris* v. *Gwin*, 10 *Ib.*, 563; *Schirling* v. *Scites*, 41 Miss., 644.

This plea shows affirmatively an appearance for both defendants.

CAMPBELL, C. J., delivered the opinion of the court.

If it be held that Solomon appeared and pleaded, no other

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question need be considered. That the plea put in must be held an appearance for Solomon we have no doubt. If judgment by default had been given against Solomon, and he had appealed from that, it would certainly be held that the judgment was wrong.

Affirmed.

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SUSAN H. HARTLEY v. MARY O'BRIEN.

POWER. *Appointment of trustee. Personal trust. Void sale.*

A power conferred on a beneficiary in a trust-deed to appoint a trustee, should the person named die, or be unwilling to act, is personal, and cannot be delegated; and where, under such power, an agent of the beneficiary assumes to appoint a trustee, a sale made by him will confer no title, either legal or equitable. *Clark* v. *Wilson*, 53 Miss., 119; *Bonner* v. *Lessley*, 61 *Ib.*, 392.

FROM the chancery court of Quitman county.

HON. W. R. TRIGG, Chancellor.

From a decree sustaining a demurrer and dismissing her bill complainant appeals. The facts are stated in the opinion.

F. A. Montgomery, for appellant.

F. M. Hamblet, for appellee.

COOPER, J., delivered the opinion of the court.

The decree of the chancellor must be affirmed, for the reason that complainant is not shown to have either a legal or equitable title to the land in controversy.

On the eighteenth day of March, 1891, the appellee and her husband executed a conveyance of the land to one W. S. Turner, as trustee, to secure a debt, therein described, to M. Gavin & Co. The deed contained a power of sale, if default should be made in the payment of the debt secured, and, also,

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Opinion of the court.

a provision that, if the trustee should die, or become unable or refuse to execute the trust, then M. Gavin & Co. should have power to appoint another trustee, who should have the same power as the said Turner.

Default was made by the grantors, whereupon Turner, the trustee, advertised the lands for sale under the provisions of the deed, but failed to appear to make the sale, whereupon John A. Cooper was appointed as substituted trustee by one J. S. Montgomery, professing to act as the agent and attorney in fact of M. Gavin & Co. Cooper proceeded to make the sale, and the lands were bid in by or for M. Gavin & Co., who received a conveyance thereof from said Cooper, and afterwards conveyed the lands to Montgomery, who conveyed them to complainant. It thus appears that the title asserted by complainant rests upon the conveyance from Cooper, the person attempted to be appointed by Montgomery as trustee, under the power of appointment contained in the deed of trust.

The appointment of Cooper by Montgomery was a nullity, and conferred no power on him to make sale of the land. The power conferred on Gavin & Co. by the grantors in the deed of trust, was in the nature of a trust, and, it is well settled, is personal to the donee, and cannot be delegated to another. *Delegatus non potest delegare.* 1 Perry on Trusts, §§ 294–511; 1 Sugden on Powers, 266; *Clark* v. *Wilson*, 53 Miss., 119; *Bonner* v. *Lessley*, 61 *Ib.*, 392.

Affirmed.

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Statement of the case.

PHŒNIX INSURANCE CO., OF HARTFORD, CONN., *v.* A. SUMMERFIELD.

1. REMOVAL OF CAUSES. *Jurisdiction. Waiver. Federal question.*

A citizen of Tennessee brought two suits in the court below against appellant, the Phœnix Insurance Company, a citizen of Connecticut, one on a policy for $3,000, and the other on a policy for $2,000. At the return-term defendant pleaded to the merits in both cases, and they were continued. Afterwards, during the term, defendant presented a petition and bond in each case to remove the same to the federal court. In each petition it was averred that the "amount involved is $2,000." No action was taken on the petitions, and afterwards defendant filed other pleas. At the next term, on defendant's motion, the cases were consolidated, and defendant, by leave, withdrew its pleas and petitions for removal, and filed a new petition and bond to remove the case, as consolidated, to the federal court. Removal was denied. *Held*, in the absence of an authoritative decision by the supreme court of the United States on the federal question involved, as matter of policy rather than conviction, in view of the history of the case, that the action of the court in refusing the removal would not be disturbed.

2. INSURANCE POLICY. *Action on. False swearing. Instruction.*

In an action on a fire insurance policy, where the dispute is as to the value of the property destroyed (defendant claiming that plaintiff swore falsely, and obtaining an instruction that, if he did wilfully swear falsely in making proof of loss, he cannot recover), a verdict for plaintiff, where the evidence of value is satisfactory, will not be disturbed because of an instruction, given at his instance, that "no false swearing in making proof of loss will avoid the policy, unless the evidence satisfies the jury that the plaintiff knowingly and intentionally swore falsely as to some material fact," and that the burden of proof is on the defendant to show the wilful intent.

FROM the circuit court of the second district of Yalobusha county.

HON. JAMES T. FANT, Judge.

On July 23, 1891, appellee, a citizen of the state of Tennessee, brought two suits in the court below against the Phœnix Insurance Company, one on a policy of insurance issued

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Statement of the case.

by that company January 30, 1890, and the other on a policy issued by it September 20, 1890, both covering a stock of goods owned by appellee, at Grenada, Miss., which was destroyed by fire, January 13, 1891. On the first day of the return-term, October 26, 1891, defendant pleaded to the merits in both cases. On the same day the cases were ordered continued, the defendant being granted sixty days within which to file additional pleas. After this order, there appears in the transcript of the record a motion by defendant to remove the cases to the federal court. This motion is not dated, and is not marked filed, but just above it, in the transcript, appears the words, "October term, 1891," and just after it the word, "continued." Next in the record appears a petition and bond in each case for the removal of the same to the United States circuit court. Neither petition is marked filed, but the bond accompanying each is marked "filed October 26, 1891." In each petition it is alleged that plaintiff and defendant are citizens of different states, plaintiff being a citizen of Tennessee, and defendant a citizen of Connecticut, chartered under the laws of that state, and that the sum in dispute, exclusive of interest and costs, "amounts to the sum of two thousand dollars." The record does not show what disposition, if any, was made of these petitions at the October term, there being no entry on the minutes concerning the same. Following these petitions and bonds is copied in the record an order of court in the two cases, setting aside the continuances granted at "a former day of this term," but no date appears.

On December 23, 1891, defendant filed additional pleas to the merits, and on April 27, 1892, it filed still other pleas.

On April 28 defendant moved the court to consolidate the cases. This motion was sustained, and plaintiff excepted. Thereupon the order recites that the defendant obtained leave to withdraw its pleas and to file a new petition for removal of the case, as consolidated, to the United States circuit court, and the petition and bond were filed. The court denied the

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Brief for appellant.

application for removal, and proceeded with the case, to which action the defendant excepted.

Defendant then pleaded to the merits, and there was a trial of the case as consolidated.

The third instruction given for plaintiff, alluded to in the opinion, is as follows: "No false swearing by the plaintiff, in making proof of loss, will avoid the policy, unless the evidence satisfies the jury that the plaintiff knowingly and intentionally swore falsely as to some material fact. There must be a wilful intent to defraud, and the burden of proof is upon the defendant to establish the defense. No mere error of judgment in statement will avoid the policy."

Among others, the following instruction was given for the defendant: "If the jury believe from the evidence that Summerfield wilfully swore falsely to any material facts in making his proof of loss, then, under the conditions of the policies sued on, plaintiff would forfeit his right to recover, and the jury should find for defendant." A clause in each of the policies provided for a forfeiture in case of false swearing.

Verdict and judgment in favor of plaintiff for $5,312.50, the full amount of the two policies, with interest. Motion for new trial overruled. Defendant appeals. The opinion contains a further statement of the case.

Slack & Doty, for appellant.

1. Whether a case is removable is a federal question, resting with the courts of the United States. On this point, we refer to the U. S. Stat. 1886–7, p. 552; *Ib.*, 1887–8, p. 433; *Jackson* v. *Railroad Co.*, 58 Miss., 648; 19 Wall., 214; 104 U. S., 15; 41 Fed. Rep., 641; 42 *Ib.*, 1; 44 *Ib.*, 515; 46 *Ib.*, 577.

Under the acts of 1887–8, the cause was removable after consolidation, if not before. After consolidation, if the amount is sufficient, the cause is removable, although the requisite amount was not involved in either suit before. 4 Fed. Rep., 257; 135 U. S., 315.

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Brief for appellant.

A non-resident defendant may remove to the federal court, although that court would have had no original jurisdiction. 41 Fed. Rep., 44, 49, 641; 91 U. S., 10, 401.

Under the act of 1887, a cause may be removed to the federal court, though neither party is a resident of the district. 42 Fed. Rep., 1; 46 *Ib.*, 577; 32 *Ib.*, 232, 673; 23 N. E. Rep., 656. See also *Bank of Sheffield* v. *Merchants' Bank*, 2 Lawyers' Ann. Rep., 469; 34 Fed. Rep., 225, 228; Removal of Causes, by Speer, § 21 *et seq.*

2. It was error to instruct that no false swearing by plaintiff would avoid the policies unless there was a wilful intent to defraud. The intent has nothing to do with it. It was for the jury to say, under the evidence, whether plaintiff swore falsely to any material fact. *Claflin* v. *Insurance Co.*, 110 U. S., 81; 6 Bush (Ky.), 396; 22 Mich., 467; 1 Harney (N. B.), 311; Ostrander on Fire Ins., 349 *et seq.*

The conditions in the policies were warranties, and not mere representations or conditions subsequent. 1 Wharton on Con., 218 *et seq.;* Pollock on Con., 469; 2 Parsons on Con., 429 *et seq.*

In this case the condition was a part of the contract, and it would be contrary to the expressed stipulation that the contract of insurance should remain valid if plaintiff swore falsely. 1 Wharton on Con., 219; 13 Conn., 533; 16 Am. Dec., 460; 22 *Ib.*, 539; 35 *Ib.*, 92. See also 1 Wood on Fire Ins., 573 *et seq.*

Mayes & Harris, on the same side,

Filed a brief discussing the question of removal, and making the following points:

1. As the petitions for removal filed at the October term averred that the amount in controversy in each case was just $2,000, we concede that there could have been no removal, if the court was confined to the allegations of the petitions. But the averments of the petition are not controlling as to this; the court looks to the whole record. Dillon on Re-

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Brief for appellant.

moval, §§ 51, 70. *Insurance Co.* v. *Francis*, 11 Wall., 210; 132 U. S., 571; 43 Fed. Rep., 695.

2. Where, as in this case, the demand is really for $5,000, so that the federal court would have jurisdiction as to amount, and the other conditions for removal exist, the plaintiff cannot deprive defendant of the right to remove by the shallow subterfuge of splitting his action. Somewhat on this line, see *Graves* v. *Corbin*, 132 U. S., 571; 141 *Ib.*, 589.

3. The language of the petitions as to diverse citizenship of the parties, is sufficient, and technically correct. 11 Wall., 210; 145 U. S., 444.

4. Replying to the suggestion that where neither party is a citizen of the district there can be no removal, we refer to 41 Fed. Rep., 641, a decision by Justice Gray of the supreme court. See also 42 Fed. Rep., 1; 2 Lawyers' Ann. Rep., 469. The manifest object of the restrictive provisions of the act of 1888 is to prevent the dragging of defendants from the vicinage, and not to give one non-resident an advantage over another. Their common non-residence leaves them equal here.

5. Whatever may be the conclusion of the court as to the point that the two suits were virtually one, and that, therefore, the controversy was removed by the petitions filed at the October term, the consolidation at the April term, followed by a new petition, operated as a removal. From the beginning, the defendant, who was entitled to a removal, was struggling to get into the federal court. It was kept in the state court, not by any remissness on its part in making known its desire, but by the resistance of the plaintiff.

If a defendant makes his demand for removal in time, and his case is in fact removable, delays of the court do not prevent the removal, and even amendments of his proceedings in the state court may be made, provided they only adjust the record to the facts as the facts originally existed. On this point, see, generally, *Removal Cases*, 100 U. S., 457; 102 *Ib.*, 135; 103 *Ib.*, 485; 104 *Ib.*, 5; 111 *Ib.*, 134; *Jackson* v. *Railroad Co.*, 58 Miss., 648.

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Brief for appellee.

William C. McLean, for appellee.

1. The court properly refused the application for removal to the federal court. The act of 1888 requires that, in order to remove, the amount in controversy shall exceed $2,000. The first petitions showed that one suit was for just $2,000, and, therefore, that the federal court had no jurisdiction. Spear on Fed. Judiciary, 464, 465; 95 U. S., 185, 186; 7 Fed. Rep., 270; 11 *Ib.*, 852; 27 *Ib.*, 884; 7 S. E. Rep., 62. See, also, 117 U. S., 432; 122 *Ib.*, 516.

One of the suits, being for only $2,000, could not be removed at all. Until consolidation, there were two suits, on distinct causes of action. If defendant wished to remove both cases, they should have been consolidated at the first term, and the application for removal should have been made then.

On an application for removal, only a question of law is presented, and that is, whether, admitting the facts stated, petitioner is entitled to a removal. This question the state court decides for itself. 130 U. S., 230; 131 *Ib.*, 242.

The object of the act of 1887, is to restrict and not enlarge the jurisdiction of the courts of the United States. 133 U. S., 315; 137 *Ib.*, 451; 145 *Ib.*, 449.

As neither party was a resident of this state, the federal court would not have had original jurisdiction of cases. 134 U. S., 41; 145 *Ib.*, 446; *Southern Pacific Co.* v. *Denton*, 146 *Ib.*, 202.

In view of the language of § 2 of the act of 1887, we are unable to understand how the federal court could acquire jurisdiction by removal when it could not do so by original proceedings. On this point, see 32 Fed. Rep., 183; 33 *Ib.*, 388, 529; 133 U. S., 316; *McNeal* v. *Howland*, 99 N. C., 202 s.c. 6 Am. St. R., 202. If plaintiff should consent to a trial in the federal court in Mississippi, the judgment would be void. 111 U. S., 379; 127 *Ib.*, 96, 322; 128 *Ib.*, 586; 141 *Ib.*, 85.

But, if it be conceded that the suit for $3,000 was removable, it is clear that defendant waived the right to remove.

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Opinion of the court.

It is settled that, under § 3 of the act of 1888, the application must be made at that term of the court when, by the laws of the state, the defendant is required to plead. *Railroad Co.* v. *Daughtry*, 138 U. S., 298. Here the consolidation was made when it was too late to remove. The right of removal, when once lost by non-user, is not revived, even by an amendment of the pleadings creating new issues. 117 U. S., 365.

That a party may, by his conduct in the state court, waive the right of removal, see 20 Am. & Eng. Enc. L., p. 1010, note 2; 100 U. S., 457; 102 *Ib.*, 141; 140 *Ib.*, 141; 76 Wis., 433. The action of defendant in having the causes consolidated when it was too late to make application for removal, was, from necessity, a waiver of the former removal proceedings.

2. There was no error in giving plaintiff's third instruction. In the first place, the defendant obtained an instruction announcing the same principle. *Wilson* v. *Zook*, 69 Miss., 694. In the next place, the instruction is correct. It simply announces that the false swearing, to avoid the policy, must be intentional. 7 Am. & Eng. Enc. L., 1047; Wood on Fire Ins., 1004; 14 Wall., 376. The instruction is not inconsistent with the views expressed in *Claflin* v. *Insurance Co.*, 110 U. S., 81.

On the question as to which it is claimed there was false swearing, the evidence in favor of plaintiff is convincing. It is submitted that there is no evidence of false swearing. It must be shown that there was such swearing, and that it was knowingly done with intent to deceive the insurer.

Ro. H. Golladay, on the same side.

Argued orally by *J. J. Slack* and *E. Mayes*, for appellant, and *Wm. C. McLean* and *Ro. H. Golladay*, for appellee.

CAMPBELL, C. J., delivered the opinion of the court.

Amid the diversity of views among the judges of the various courts of the United States, and in the absence of an

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authoritative utterance by the supreme court of the United States as to the interpretation of the late legislation by congress as to the removal of cases from the state courts, we have determined, as matter of policy rather than conviction, to maintain the decision of the circuit court against the removal of the case to the court of the United States. It seems to us probable that it will be held, finally, that the right of removal is not confined to cases in which the action might have been instituted in the court of the United States, but, in doubt as to this federal question, which we cannot decide authoritatively, and because of the history of this case in the state court, we decline to reverse the judgment because of the removal proceedings.

The only other question worthy of serious consideration is as to the propriety of the third instruction for the plaintiff, and our conclusion is that, as applied to the facts of this case, it is unobjectionable. It is subject to the criticism of *seeming* to require the production by the defendant of independent evidence of an intention to defraud by false swearing in order to defeat a recovery on this ground. If it means that, it is wrong, for the false swearing to any material matter calculated to mislead or deceive the insurer, knowingly and intentionally done, would defeat a recovery, while false swearing as to a fact wholly foreign to the matter involved, or a mistake or unintentional misstatement, would not have such effect. We concur in the view held in *Claflin* v. *Insurance Co.*, 110 U. S., 81, but think the instruction mentioned, when applied to the matter in dispute here, is not inconsistent with the sound doctrine of that case. Its dominant thought is that false swearing must have been intentional to defraud, and that is true. The dispute was as to the quantity and value of the goods destroyed. The alleged false swearing had relation to that inquiry, and was, therefore, material, and, if it was intentionally false, it was sufficient to defeat recovery. The instruction, although in a dangerous form, does not controvert this proposition, and, in view of the instruction on

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Brief for appellant.

the same subject obtained by the defendant, and the satisfactory evidence that the goods destroyed by fire exceeded in value the amount of insurance, the judgment will be—

Affirmed.

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H. WETTER MANUFACTURING CO. v. W. L. DINKINS ET AL.

1. ASSIGNMENT FOR CREDITORS. *Preference. Usurious debt.*

An assignment for creditors is not rendered invalid by the preference of a creditor whose debt embraces usury, if the amount directed to be paid does not exceed the principal due and legal interest thereon. The assignor may waive his personal privilege under the statute of defeating all interest.

2. SAME. *Preference. Innocent mistake. Interest.*

If in such case the assignor intends to prefer such debt purged of excessive interest, but, through mistake in computing the amount, fails to eliminate all of the excessive interest (the assignee being directed to pay only the amounts justly due all creditors), the assignment will not be rendered invalid.

FROM the chancery court of Madison county.

HON. H. C. CONN, Chancellor.

W. L. Dinkins, a merchant, failed in business and made a general assignment of his effects, preferring certain creditors. Appellant, an unpreferred creditor, filed the bill in this case to set aside the assignment and subject the property, claiming that the assignment was fraudulent and void because of the preference of a certain usurious debt. From a decree sustaining a demurrer and dismissing the bill, this appeal is prosecuted. The opinion contains a further statement of the case.

Calhoon & Green, for appellant.

In *Torrey* v. *Grant*, 10 Smed. & M., 89, it is declared that a usurious contract is void, being based on an *illegal* consideration, and that no waiver of it as a defense can be binding.

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Brief for appellant.

This is approved in *Kountz* v. *Price*, 40 Miss., 341. In *Marks* v. *Bradley*, 69 Miss., 1, it is declared that assignments with preferences do not commend themselves to the courts; that the power to make preferences must be confined within legal limits, and that no infringement upon the rights of creditors can be permitted.

The debtor does not owe usury. It is a creation by agreement, not within legal limits, of a false claim which creditors must remove before they can enforce their rights.

In Burrill on Assignments, § 118, there is only a meager compilation of cases. The author inclines to the New York doctrine, which is, that if a debt including usury is preferred, it will not render the assignment void, but the assignee will be required to scale the usury. See § 428. Such is not the ruling in this state. *Selleck* v. *Pollock*, 69 Miss., 870. In the North Carolina case cited by Burrill, there was a trust-deed to secure a single usurious debt, and it was held void. The case of *Pennington* v. *Woodall*, 17 Ala., 685, cited by this author, holds, contrary to the text, that if the instrument is made intentionally to secure to the creditor a larger amount than is due, it renders it void. The case of *Early* v. *Owens*, 68 Ala., 171, overrules the case cited from 50 Ala.

In Bigelow on Frauds, pages 50, 133, 135, 157, 325, it is laid down that the debtor may prefer persons whose claims, by reason of some technical rule or policy of law, are not enforceable. By way of illustration, cases are cited on the statute of frauds where the statute was waived; and so of the statute of limitations, and of usury. As to the last, *Pennington* v. *Woodall*, 17 Ala., is cited; but, as shown, it does not sustain the text. *Chapin* v. *Thompson*, 89 N. Y., 271, is also cited, but that case holds that usury cannot be preferred.

The rule of administration of assignments has been condemned in this state. *Montgomery* v. *Goodbar*, 69 Miss., 333. Cases upon the waiver of the statute of frauds have no application, for, if the debt is preferred in the writing, the terms

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Brief for appellees.

of the statute are complied with. See Bigelow on Frauds, 135; *Metcalf* v. *Brandon*, 58 Miss., 841. Nor do cases upon the statute of limitations affect the question. It has always been a sufficient consideration for a new promise that there had been a debt. But it was held in *Edwards* v. *McGee*, 31 Miss., 143, that a creditor whose debt was barred could not maintain a bill to set aside a fraudulent conveyance. See, also, *Partee* v. *Matthews*, 53 Miss., 140.

There is no principle of public policy to aid the collection of usury in the face of statutory prohibition. Section 755, code 1892, makes a confession of judgment tainted with usury void. Usury may be recovered by the debtor if paid. If a debtor may create for preference any conventional sum as interest, there is no limit to the power. As said in the case of *Arthur* v. *Bank*, 9 Smed. & M., 394, "all over and above what is necessary for the division of the property for the payment of debts cometh of evil."

While it is competent to include past-due interest, upon the renewal of a note, it is not competent to stipulate for interest in advance when the contract is made. *Perkins* v. *Coleman*, 51 Miss., 298.

W. H. Powell, for appellees.

1. There is nothing in the case of *Marks* v. *Bradley*, 69 Miss., 1, to sustain the contention of opposite counsel that, because of usury in one of the preferred debts, it is to be treated as simulated and fraudulent.

2. But, should this court agree with counsel on the general question of usury, it will avail appellant nothing, because the defense of usury is a personal privilege, and the debtor has waived his right to plead it. A lien creditor might perhaps occupy a position different from that of the appellant, because, in that case, there would be privity of contract between him and the debtor. A junior mortgagee might raise the question of usury in a prior mortgage. But it would be a novel doctrine to hold that a creditor recovering judgment,

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and thereby obtaining a second lien on property, could plead usury as against a prior lien.

3. I submit that appellant has not acquired such a lien upon the property here as to enable it to interpose the defense of usury. A debt wholly usurious is not void. It is simply voidable, at the election of the debtor or those in privity with him by contract.

4. Should I err as to all this, the most that can be done in any event will be to purge the debt of usury. *Chaffe* v. *Wilson*, 59 Miss., 42, and *Boyd* v. *Warmack*, 62 Miss., 536, are entirely different from the case at bar, and have no application.

Argued orally by *M. Green*, for appellant.

WOODS, J., delivered the opinion of the court.

On its undisputed facts, this case is readily resolvable on elementary principles. These facts are, briefly, that the appellee, Dinkins, was indebted to Parker, the preferred creditor in the deed of assignment, computing and including usurious interest, in the sum of $1,620.93; that Parker is, by the terms of the assignment, preferred for $1,550 only, and this latter amount is less than the principal debt due by the assignor, Dinkins, to Parker, with legal interest thereon.

The elementary principle is, that the debtor who has contracted to pay usurious interest, may waive his personal right to defeat a recovery of all interest, and that, responding to the voice of conscience, he may elect to do equity by paying the principal, with legal interest thereon; and this is exactly what the appellee, Dinkins, has chosen to do. He has waived his personal privilege of defeating the collection of any and all interest, and has elected to pay a gross sum, which is less than the principal debt with legal interest. He has not preferred the payment of usurious interest, nor devoted property in the hands of his assignee to that purpose. He has only waived his privilege to defeat all interest, and elected to do what in equity he may—repay the sum of money borrowed and due, with legal interest thereon.

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Response to the suggestion of error.

The decree of the learned court below is perfectly maintainable on this ground, and is accordingly—

Affirmed.

Thereafter, *Calhoon & Green*, for appellant, filed a suggestion of error, accompanied by a calculation, with a view to showing that the debt of Parker preferred in the assignment was usurious. Counsel referred to the case of *Dickerson* v. *Thomas*, 67 Miss., 777, in support of the proposition that where there is a proceeding to enforce an executory usurious contract, all interest is forfeited.

WOODS, J., delivered the opinion of the court in response to the suggestion of error.

We are of opinion that the preference of Parker in the deed of assignment for $1,550 only, was an effort on the part of the assignor to purge the debt thus preferred of usurious interest. In the calculations made by us on the former examinations of the record, we were of opinion that no usurious interest was to be found in the sum preferred. The superior arithmetical skill, however, of the counsel for appellant has demonstrated our error to the extent of ten dollars. But this mere error in computation will not invalidate the assignment; for in express, though involved and obscure terms, the assignee is directed to pay the amounts really due, if it shall be found that, by mistake, the amount of any debt has not been accurately stated in the assignment. The conclusion is irresistible that the assignor directed payment of Parker's debt, purged of usury, as he mistakenly computed the debt and its usurious interest; and the assignee can and will pay Parker's preferred debt only in that way and to that extent.

Suggestion of error denied.

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Statement of the case.

GOODBAR, WHITE & Co. *v.* J. P. OWEN.

1. JUSTICE COURT. *Trial. Notice to defendant. Emergency. Code* 1880, § 2194.

Under § 2194, code 1880, when the plaintiff or defendant in a justice court is a non-resident or transient person, and it is made to appear by affidavit that a delay of the trial until the regular term would be of material injury, the justice may have the parties summoned to appear at any "reasonable time," to be named by him, and give judgment.

2. SAME. *Jurisdiction. Appeal. Trial de novo. Code* 1880, § 2354.

What is a reasonable time is a question for the decision of the justice. Service of the writ gives him jurisdiction of the defendant, and, where he has jurisdiction of the subject, and the defendant appeals, the circuit court cannot dismiss the case on the ground that reasonable notice was not given. In such case, under § 2354, code 1880, the case will be tried anew on its merits in the circuit court. In order to challenge the decision of the justice on questions of law only, the remedy is by *certiorari*.

3. APPEAL. *Jurisdiction. Dismissal. Code* 1880, § 2354.

Under § 2354, code 1880, it is only where the justice has no jurisdiction, and not where he makes an erroneous decision within his jurisdiction, that the case is to be dismissed by the circuit court on appeal.

FROM the circuit court of Sunflower county.

HON. R. W. WILLIAMSON, Judge.

On April 15, 1892, appellants, Goodbar, White & Co., filed with a justice a note given them by appellee, J. P. Owen, for $188.07, payable April 1. On April 18, 1892, an affidavit was filed with the justice, in which the attorney for plaintiff alleges "that he is informed and believes that said Goodbar, White & Co. are non-residents of the state of Mississippi, and affiant further says that a delay of the trial of the above cause until the next regular term of this court would be of material injury to said Goodbar, White & Co."

On the same day, at 10 o'clock A.M., a summons was issued for defendant, returnable before the justice at 4 o'clock P.M. on that day, to answer the suit. The summons was executed

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Brief for appellee.

at once, and at the time named the trial was had, resulting in a judgment for plaintiffs. Thereupon defendant appealed to the circuit court. On May 17, 1892, he moved the circuit court to dismiss the case, on the ground that he had not been served with process a reasonable time before the trial. On the hearing of this motion, it was shown that the defendant lived in Indianola, less than 250 yards from the office of the justice, and that before the institution of the suit he had admitted to plaintiff's attorney that the debt was just, and that he had no defense. There was no further testimony. The motion was sustained, and, from a judgment dismissing the case, plaintiff appeals.

A. G. Paxton, for appellants.

The proper affidavit was made. Code 1880, §§ 2194, 2195. "A reasonable time," within the meaning of § 2194, is a proper and reasonable time for the parties to prepare for and appear at the trial. There being no defense, and no witnesses to be summoned, the defendant living within three minutes' walk of the court-room, six hours was ample.

Calhoon & Green, for appellee.

1. Under § 2194, code 1880, six hours is not a reasonable time to intervene between service of process and the trial. Of this, the court must judge on general principles, and not from the nature of the cause of action.

2. There must be a return-day for process, not a return-hour of the same day. Less than a day is unreasonable. To hold otherwise would be a bad precedent, involving the danger of bringing the courts into contempt because of undue haste.

3. But defendant is entitled to five days notice, and § 2194 does not change this, as will be seen by reading it in connection with §§ 2196, 2197. Construing all the sections together, the law is that there must be five days between service and the trial. Under § 2194, if the term be too far off, the trial

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may be had before that, the defendant, in any event, being given five days notice.

4. The affidavit in this case is fatally defective in failing to show in what way delay would be of material injury to the plaintiffs. The facts must be stated, not a legal conclusion.

COOPER, J., delivered the opinion of the court.

That the part of § 2194 of the code of 1880, providing for the trial of a cause before a justice of the peace at any reasonable time other than the regular term, when the plaintiff or defendant is a non-resident, and it shall be shown by the oath of either party that a delay of the trial to the regular term will be of injury to him, authorizes the writ to be made returnable at such "reasonable time," is made entirely clear by §§ 2196 and 2197. By § 2196 it is provided that the summons shall be executed five days before the return-term, "and any summons issued within five days before its return-day, shall be made returnable to the next succeeding term of the court after that, to be held within five days, unless a shorter day shall be named, in pursuance of the provisions for a trial without delay, in the case of non-resident or transient persons." The language of § 2197 is, "if such process shall be executed less than five days before the return-day, except as aforesaid," etc. It is thus made manifest that the summons in cases falling within the provisions of § 2194 may be made returnable at the "reasonable time" named by the justice.

What is a reasonable time within the meaning of the law, is a question for the determination of the justice of the peace, by whom it must primarily be decided, and it follows as a corollary that the service of the writ upon the defendant must be held to give the court jurisdiction of the defendant, or the anomaly would be presented of a court deciding a question before acquiring jurisdiction of the defendant. If the justice of the peace had jurisdiction of the subject-matter, as to which there is no controversy, and of the defendant, which, as we have said, it must be held that he did, the appeal

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to the circuit court carried to that court the right and jurisdiction "to try the cause anew on its merits." Code 1880, § 2354. The circuit court, by the appeal, having jurisdiction of the parties and the subject-matter, should have proceeded in the trial of the cause on its merits, for it is only where the justice did not have jurisdiction, and not where he makes an erroneous decision within his jurisdiction, that the cause should be finally dismissed. Code 1880, § 2354.

If the defendant desired to challenge the decision of the justice on a question of law, his remedy was to invoke the revisory power of the circuit court by certiorari; having appealed, his right is only to a new trial on the merits.

Judgment reversed, and cause remanded to the circuit court.

T. J. AND C. W. COCHRAN *v.* GEORGE RICHBERGER ET AL.

1. CHANCERY PLEADING. *Code* 1880, § 539. *Bar thereunder. Averments of answer.*

An answer, filed in 1891, averring that defendants acquired a tax-title to the land in controversy in 1878, "and have been in possession for more than three years from the date of said deed," does not sufficiently set up the bar provided by § 539, code 1880, in that it fails to show that defendants have occupied the land for the time required since the code of 1880 (which is prospective) went into effect.

2. TAX-TITLE. *Three-years possession. Code* 1880, § 539. *No bar, if land redeemed.*

Possession under a tax-title for the time required by § 539, code 1880, which provides that "actual occupation for three years, after one year from the day of sale, of any land held under a conveyance by a tax-collector, in pursuance of a sale for taxes, shall bar any suit to recover such land or assail such title *because of any defect in the sale of such land for taxes, or in any precedent step to said sale*," will not bar the owner where, within the time allowed, there was a redemption, this being a matter occurring *after* the sale.

FROM the chancery court of Quitman county.
HON. W. R. TRIGG, Chancellor.

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Statement of the case.

The lands in controversy, situated in Quitman county, were sold to the liquidating levee commissioners in 1868, for non-payment of levee taxes, and appellees claim under this sale. They were again sold to the liquidating levee commissioners in 1869. But the court finds from the record that R. J. Love, the original owner, redeemed the lands from both of these sales. Notwithstanding this, however, G. W. Neel purchased the lands from Gwin and Hemingway, commissioners of the liquidating levee board, in February, 1878, and received a deed therefor.

In January, 1872, the lands were sold to the state for non-payment of state and county taxes, and they were again sold to the state, under the abatement act, May 10, 1875. On October 21, 1880, they were purchased from the state by A. S. Oliver, who conveyed them to appellants, T. J. and C. W. Cochran. While the lands were held or claimed by the state, under the sales before mentioned, they were, on March 3, 1879, again sold by the tax-collector of Quitman county, being struck off to the state. But, on January 30, 1880, Neel, who had purchased from the liquidating levee commissioners, and who claimed the lands, redeemed them from this sale, paying the auditor the taxes for two years, and receiving a certificate of redemption.

Neel owned adjoining land, upon which he had tenants, who cut timber from both tracts, and asserted ownership and possession to some extent, as stated in the opinion. Neel conveyed to Wilbourne, who also asserted ownership, and he conveyed to appellee, Richberger, who gave a trust-deed on the lands, to secure a debt to the Clarksdale Bank & Trust Company.

The bill in this case was filed by the appellants, T. J. and C. W. Cochran, March 13, 1891, against Richberger and the trustee in the deed to the bank. Complainants claimed under their purchase from the state, alleging that they were the real owners of the land, and seeking to cancel the claim of the defendants as a cloud upon their title. The defend-

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Brief for appellants.

ants answered, denying the title of complainants, and asserting title in the said Richberger. Among other things, they averred that said defendant, and those through whom he claimed, had been in the actual, adverse, and exclusive possession of the lands for more than ten years next before the filing of the bill; that they claimed under a tax-title from the state of Mississippi, and had been in possession of the lands thereunder for more than one year. They also set up the bar arising from three years' occupancy of the lands under said deed, and also the lapse of five years after the execution of said deed before suit under the act of 1860. Laws, p. 213. Because of the several statutes of limitation so pleaded, the defendants averred that their title was absolute and indefeasible, and that complainants were barred of all relief. Defendants also set up that they had made valuable improvements, and had paid a large amount in taxes on the lands, and they asked that a charge be fixed thereon to satisfy the same, in the event their title should be held invalid.

On final hearing, a decree was rendered in favor of defendants, dismissing the bill, from which decree complainants appeal. The opinion contains a further statement of the facts necessary to an understanding of the questions decided by the court.

J. B. Cochran, for appellants.

1. The evidence shows that there was a redemption from the sale to the levee board in 1868.

In the case of *Shotwell* v. *Railway Co.*, 69 Miss., 541, this court held that, by virtue of the act of 1876, the title to all lands held by district No. 1, if not redeemed or purchased before a certain date, was vested in the state. The act seems to apply as well to lands belonging to the liquidating levee commissioners. If it does, appellants are the owners of all tax-titles shown by the record. Neel does not claim to have purchased from Gwin and Hemingway until after January 1, 1878.

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Brief for appellees.

2. In the lower court appellees invoked every statute of limitation known to the law, and introduced evidence to prove possession, but it is only necessary to refer to the depositions in the record to show that they failed as to this.

J. W. & W. D. Cutrer, for appellees.

1. The land in controversy is shown to have been sold to the liquidating levee board in 1868. The deed is *prima facie* evidence of a valid sale. Laws 1858, pp. 36, 37; Laws 1867, pp. 238, 239; *Carlisle* v. *Yoder*, 69 Miss., 384.

2. More than five years elapsed from the date of sale before an attack was made upon it, and the title is now perfect. *Sigman* v. *Lundy*, 66 Miss., 522; *Carlisle* v. *Yoder*, *supra*.

3. The act to quiet and settle titles claimed under sales for delinquent liquidating levee taxes, in express terms makes the title of appellees valid, notwithstanding any defect or irregularity in the sale. Such title can only be impeached by proof that the taxes for which the land was sold had been paid. Laws 1888, p. 42.

4. The land was conveyed by Gwin and Hemingway to Neel. Subsequently he redeemed from the state, after which he held the title free from all prior claims. The title is paramount. On this incontrovertible state of facts, the conclusion cannot be escaped that the appellants have failed to show a good tax-title.

5. The sale to the levee board in 1868 cannot be controverted. This being true, the land was not subject to sale to the state either in 1872 or in 1875, as this court has invariably held. The title of appellants rests upon sales which have already been adjudicated to be void. Neel bought from Gwin and Hemingway in 1878, and this sale carries with it the presumption that all claims against the land prior to that date had been extinguished.

6. Appellees rely on the five-years' statute in force at the time of the sale to the levee board, which this court has repeatedly held to have been operative at that time.

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Opinion of the court.

7. Reliance was further made upon the three-years' statute of limitations. The facts in support of this are that Neel owned the land, together with adjoining lands. He had a tenant on the adjoining tract, and this tenant cleared up land upon both tracts, used fire-wood and timber from both tracts indiscriminately, and occupied the property as thoroughly as it was possible to enjoy lands of the class and condition in question. Neel sold to Wilbourne, whose occupation was of the same character. Wilbourne sold to Richberger, and the possession thereafter continued as before. On this point see *Kirkman* v. *Mayes*, recently decided by this court.

COOPER, J., delivered the opinion of the court.

All consideration of questions involving the validity of the sale of the lands in controversy made to the levee board in May, 1868, is dispensed with by reason of the established fact that the lands were redeemed or purchased by Love under this sale, as well as under that made in 1869. Counsel for appellee have been misled by the statement of the auditor, W. W. Stone, whose deposition was taken. It is true this witness was asked, on cross-examination, to state whether the records of his office do not show that Love redeemed the land from the sale of 1868, and, in his answer, he fails to respond to this question, and only states that Love redeemed from the sale of 1869. But he also says that he has no information in reference to any of those sales or redemptions, except such as is furnished by the records of his office, copies of which he filed with his answers. On page 103 of the record is found the redemption from the sale of 1869, of which the witness speaks in his testimony, but on page 102 is found also a certified copy from his office, showing a redemption from the sale of 1868, as to which he is silent. This certified copy is made an exhibit to his deposition, and is referred to by him as supplying the information he has on the subject.

It is unnecessary to review the statutes relied on by the

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appellees as curing any defects in that sale, since, if valid, it has become ineffectual by reason of the redemption.

Section 539 of the code of 1880 supplies no support to the claim of appellees, for several reasons. First, the answer does not set up that defendant and those under whom he claims have been in the actual occupation of the land for three years after the expiration of one year from the sale for taxes under which his title is derived, and since the adoption of the code of 1880. The answer only says that the parties under whom the defendant claims title, bought the land from Gwin and Hemingway in the year 1878, and have been in possession "for more than three years from the date of said deed." This may be true, and yet the defendant, and those under whom he claims, may not have been in such occupancy for three years since the code (which is prospective in its operation) was adopted.

But this provision of the code does not confer title upon an occupancy of three years. Its declaration is that, "actual occupation for three years, after one year from the day of sale, of any land held under a conveyance by a tax-collector, in pursuance of a sale for taxes, shall bar any suit to recover such land or assail such title because of any defect in the sale of such land for taxes, or in any precedent step to said sale, saving to minors," etc. The statute does not provide that possession for the time named shall confer title, nor that no suit shall be brought for the recovery of the land, but only that the title claimed shall not be assailed after the lapse of the time named, "because of any defect in the sale of such land for taxes, or in any precedent step to said sale." If the land was legally sold for the taxes of 1868, and the defendant had occupied for the time named in § 539 of the code, this would not preclude a recovery by the true owner who could show a redemption of the land from the sale under which the defendant claimed, for the suit would not be "to recover the land or assail the title because of any defect in the sale of such land for taxes, or in any precedent step to said sale,"

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but it would be to recover the land because, though legally sold, the title had been re-acquired by the former owner by a step lawfully taken *after* the sale, viz., by redemption.

We have carefully read the evidence upon the subject of the adverse possession claimed by the defendant, and it is sufficient to say that the overwhelming weight is with the appellants. Richberger and Neel, in very general and positive language, claim to have held the land in possession for many years, but the particular facts which prove such possession are not given.

On the other hand, the witnesses for appellants, who reside in the immediate vicinity, testify that the whole tract is wild and uncultivated; that there is not now, and never has been, a house on it, and no part of it has ever been in cultivation. The work upon the land, performed by Sam Miller and Pink Green, which is the only thing specifically shown by the defendants as having the color of possession by them, is clearly proved to have been commenced in the year 1890, and to have been abandoned before a single foot of the land was in condition to be cultivated. What they did was not of the character to give possession, and was of so recent a date as to be of no effect in support of any bar by which the title of the appellants could be affected.

No defect in the title asserted by the appellants is suggested, and the decree should have been in their favor.

Decree reversed, and decree here.

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Syllabus.

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G. W. DUNTON ET AL. *v.* ELLA M. SHARPE ET AL.

1. TRUST-DEED. *Future debts. Default. Declaring debt due. Sale.*

Where a trust-deed, given a corporation to secure a debt due in future, contains a stipulation that, on default in payment of interest, the beneficiary may declare the whole debt due, it is not essential that there shall be any formal declaration. Proceeding through its agents, according to its custom, and causing a sale by the trustee, will be deemed an exercise of its right to declare the debt due.

2. TRUSTEE'S SALE. *Ministerial acts by others. Approval of trustee.*

The personal attendance by the trustee, at a sale of land under a trust-deed, is not essential. He may act through others in advertising and making the sale. All that is necessary is, that the terms of the trust-deed shall be complied with as to this, and that the trustee shall approve the sale and execute a deed. See *Tyler* v. *Herring*, 67 Miss., 169.

3. SAME. *Agent of trustee. Bidding for purchaser. Validity of sale.*

The fact that the representative of an absent trustee, who advertises and makes the sale under a trust-deed, is empowered to bid a fixed sum for the purchaser, and does so, will not incapacitate him from making the sale, especially where it appears that, but for this, the land would have sold for less.

4. SAME. *Title acquired. Prior purchase at tax-sale.*

Title to land acquired at a trustee's sale will not be affected by the mere fact that, prior to such sale, after default by the grantor in the trust-deed, the purchaser had bought the land at a tax-sale.

5. SAME. *Effort to set aside sale. Overflow. Delay.*

A trustee's sale of land, though made at a somewhat reduced price, will not be set aside on the ground that it was made just after a disastrous overflow, and when the debtor, who was poor, had asked for a delay, default under the trust-deed having been made before the overflow, and there being no reason for believing that the sale could have been averted if the overflow had not occurred.

6. SAME. *Notice of sale. Acquiescence. Estoppel. Presumption.*

Where the grantor is present at a sale made under a trust-deed, and seeks a postponement thereof, and afterwards endeavors to buy the land from the purchaser, and, failing in this, threatens to contest the sale on spe-

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Statement of the case.

cific grounds, never alluding to a failure to give the prescribed notice, in a suit to set aside the sale, brought several years after possession taken thereunder, independently of any presumption arising from the trustee's deed, it will be assumed that notice of the sale was given as required.

7. SAME. *Sale in pais. Good faith. Impartiality. Case.*

While holding that the utmost good faith and impartiality must characterize the execution of a power of sale *in pais* under a trust-deed, on the facts of this case, the court refuses to set aside such a sale, without reference to complainant's delay in seeking to vacate it.

FROM the chancery court of Coahoma county.

HON. W. R. TRIGG, Chancellor.

On January 31, 1883, appellee, Mrs. Sharpe, then Ella M. Riddick, executed a trust-deed on her plantation, containing 672 acres of land, in Coahoma county, Miss., to one Sherwood, as trustee, to secure a debt to the American Mortgage Company, of Scotland, amounting to $2,000, payable December 1, 1887, with five interest coupon notes, payable, respectively, on December 1, 1883, and annually thereafter. The rate of interest was ten per cent. per annum, and the deed provided that if the coupon notes were not paid as they matured, they should bear interest thereafter at the rate of ten per cent. per annum. It also provided that if accruing taxes were not paid by the grantor, the beneficiary might declare the debt due, or might elect to pay the taxes and add the same to the secured debt. The trust-deed further provided that, should the grantor fail to pay the interest as it matured, or to comply with any of the conditions of the deed, the beneficiary, without notice to the said grantor, might elect to declare the whole indebtedness due, and proceed to have the property sold by the trustee under the power of sale therein contained. Default having been made, the property was sold under the trust-deed June 2, 1884, to appellee, G. W. Dunton, for $2,440, the amount then claimed to be due under the trust-deed, including interest and all charges. The sale was made in the name of Sherwood, the trustee. He, being a citizen of New York, was not personally present at

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Statement of the case.

the sale, but was represented by D. A. Scott, who was requested to advertise and make the sale. Mr. Scott was also authorized to bid, for Dunton, at the sale, the sum named. The land was sold at auction, as required, and was bid off by Mr. Scott, in the name of Dunton. There is some uncertainty in the record as to whether the sale was actually cried off by Mr. Scott, or his brother-in-law, Mr. Yerger. A deed, in due form, was executed by Sherwood, the trustee, to Dunton, the purchaser. It recites a compliance with the requirements of the trust-deed, that default had been made, that the debt had been declared due, that notice of the sale was duly given and that the land was properly sold by the trustee. The trust-deed authorized the said Sherwood, or other person appointed to act for him as trustee, to advertise and sell, in case of default.

In March, 1884, prior to the sale under the trust-deed, the lands were sold for the non-payment of taxes, and were bought in by Dunton.

At the time of the trustee's sale, the grantor, through her agent or tenant, was in possession of the property. Subsequently, on January 2, 1886, Dunton sold and conveyed the land to appellee, J. H. Field, who resided in the state of Alabama, for the sum of $4,000, of which $500 was paid in cash, and the balance was secured to be paid in annual installments of $500 each, with interest at the rate of ten per cent. per annum from date. Dunton, it appears, after some litigation with Mrs. Sharpe, collected the rents for the years 1884 and 1885. At the time of his purchase, Field, without objection, took possession of the property, and has since held the same.

On December 13, 1889, appellee, a citizen of Memphis, Tenn., filed the bill in this case against the appellants, F. W. Dunton, J. H. Field, and Sherwood, the trustee, seeking to set aside the sale by said trustee, and to cancel the conveyance of Dunton to Field. The bill alleges that all the recitals in the deed executed by the trustee as to the exercise of the power of sale under the trust-deed are false; that the alleged

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advertisement and sale were without the request of the mortgage company; that Sherwood, the trustee, did not make the sale, but that it was made through and by the direction of Dunton, who was the agent of the Corbin Banking Company, by whom the loan was negotiated for complainant; that the sale was managed and conducted throughout by D. A. Scott, the agent of Dunton, the purchaser; that Scott bid in the property for Dunton, and that it was sold for only one-fifth of its real value; that Field had full notice of the defects in the exercise of the power of sale. The bill further alleges that, while complainant executed her notes for the loan of $2,000, she actually received in cash only about $1,600. It also alleges that the pretended advertisement and sale were made immediately after a most disastrous overflow; that the entire Delta country, including the land of complainant, was submerged, causing the destruction of houses, fences and other improvements, and, particularly, that this was the case with complainant's land; that gloom and general demoralization followed, and that farming operations were practically suspended; that, owing to this, the lands were not cultivated during the year 1882, but that complainant leased the plantation for the years 1883, 1884, 1885, and would have been able to pay the debt, if an extension of time had been granted as requested. Complainant further alleges that she was very poor, and had a family of children dependent on her for support, and, therefore, was not able to contest the sale, which she alleged to be illegal, but that she gave notice to Dunton, and others in interest, that she would contest the sale as soon as she was able to do so; that she had spoken to a number of attorneys with reference to contesting the sale, but was unable to raise funds sufficient for this purpose.

The prayer of the bill is that complainant be allowed to redeem, and that the purchasers be treated as mortgagees in possession, the complainant offering to pay whatever is found due on the mortgage debt, as well as for any improvements made in good faith.

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Statement of the case.

The answer of Dunton denies the material allegations of the bill as to the advertisement and sale; admits that Sherwood was not personally present, but avers that the sale was made by him under the trust-deed; avers that the property was duly advertised and sold, and that the trustee ratified the sale and executed a deed to the purchaser, who had conveyed the property to Field. The answer further avers that before the sale Mrs. Sharpe made application to the mortgage company to have the sale postponed, and for an extension of time, which was refused; that she suffered the sale to proceed and yielded possession of the property, and is estopped by laches and by her conduct to complain of the sale. Sherwood, the trustee, in his answer also denies the material allegations of the bill as above, and avers that the sale was duly advertised and made, and that he ratified the same and executed a deed to the purchaser. He avers, also, that on default of the grantor the whole indebtedness was declared to be due, and that the mortgage company, through its agents and attorneys, directed the sale to be made.

The defendant, J. H. Field, in his answer also denies the material allegations of the bill as to the regularity of the advertisement and sale, and sets up that he purchased in good faith without notice of defects or irregularities, if any, and that no objection was made to his taking possession.

Testimony was taken at length. Among other things, that of complainant tends to show that at the time of and immediately after the sale, she was in ignorance of any irregularity in respect to the same, except the failure of the trustee to be personally present, and this her attorney deemed insufficient to set aside the sale; that she then endeavored to repurchase by offering to pay the debt with interest, taxes and all charges, which was refused; that thereupon notice was given Mr. Scott, who was acting for Dunton, that she intended to contest the sale; that it was not until 1889 that she learned, through her attorney, of the alleged illegality growing out of the fact that Mr. Scott, while acting for the trustee, also represented the

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Statement of the case.

purchaser at the sale; that shortly after the invalidity of the sale was discovered, and she had been advised of her rights, the bill was filed. The testimony also shows that only four or five persons were present at the sale, and that only the one bid was made.

The facts in regard to the appointment of the trustee are, that the mortgage company, on being informed of the default in payment of the interest, sent the notes and trust-deed from Edinburgh, Scotland, to the Corbin Banking Company, of New York, where the debt was payable, for foreclosure and collection in the usual course. The papers were, by the Corbin Banking Company, turned over to J. P. Dosh, the attorney of the mortgage company in New York, for collection. Dosh informed Sherwood, the trustee, who was an agent of the mortgage company, that the debt had been declared due, and requested him to sell as trustee. Sherwood instructed him to have some responsible person make the sale in his name, as it was impossible for him to be present. Dosh then forwarded the notes and trust-deed to D. A. Scott, at Friar's Point, Miss. Scott wrote, advising Dosh that he had posted notices of the sale, and stating that he thought it likely that the company would have to buy the lands in. Dunton informed Dosh that he would bid the $2,440 for the property, and, by his request, Dosh authorized Scott to make the bid. Sherwood, the trustee, being informed of the facts of the sale, executed the deed. He was connected with the Corbin Banking Company, and there was some testimony tending to show that, as agent of the mortgage company, he had authority to declare the debt due. There was no evidence introduced in regard to the posting of notices. The sale was made at the court-house door of the county, as required by the trust-deed. It was shown that the property had more than doubled in value between the time of sale and the hearing of the case.

There was no denial of the allegations of the bill as to the overflow, and as to complainant's financial condition, and her

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Brief for appellants.

efforts to have the sale postponed. Nor was the allegation that the complainant only received $1,600 at the time of the loan, denied.

A decree was entered in favor of complainant, from which the defendants appeal. The opinion contains such further statement of the case as, with the above, will indicate the points decided.

Watson & Fitzhugh, for appellants, Dunton and Sherwood.

1. The personal presence of the trustee at the sale was not necessary. *Johns* v. *Sergeant*, 45 Miss., 332; *Tyler* v. *Herring*, 67 Miss., 169. Irrespective of these authorities, the trust-deed in this case expressly authorized the trustee, or other person appointed to act for him, to make the sale.

In answer to the proposition that the trustee was not required by the mortgage company to sell, it is only necessary to call attention to these facts: (1) that default had occurred in payment of interest; (2) that the beneficiary had the right to declare the whole debt due; (3) that it had sent the note and trust-deed for collection; (4) that the attorney was requested to sell; (5) the trustee, who was also the agent of the mortgage company, had the right to declare the debt due, and he requested the sale made; (6) the trustee, who, as the agent of the mortgage company, had the right to declare the debt due, recites in his deed that this was done.

Where the mortgagee has the option to consider the entire debt matured on any default, it is not necessary that there shall be any formal expression for the purpose of declaring such option. Recital to this effect in a deed under a power of sale in the mortgage is sufficient. Generally, no notice of the intention to consider the whole debt due is necessary. Proceeding to enforce the mortgage sufficiently shows this. 2 Jones on Mort., § 1182; 8 Am. & Eng. Enc. L., 193, 194.

2. The contention that Scott was Dunton's attorney, and therefore not competent to conduct the sale, is based on mistake of fact. Scott was merely authorized to bid a certain

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Brief for appellee.

amount. He was not retained by Dunton for any legal services. As the person authorized to conduct the sale for the trustee, he received the bid, and the property was struck off to Dunton. He had no authority to do any thing for Dunton save make the one bid, for a fixed amount. He had no interest in the purchase. The facts do not present the case of the same party being the seller and buyer. Besides, the absent trustee ratified the sale by executing a deed, and this conveyed the title.

3. The bill was not filed until more than five years after the sale. Meantime, Field had remained in undisturbed possession, and the property had gradually increased in value. On this point, see 90 Mo., 239; 91 U. S., 591; 143 *Ib.*, 553.

That complainant is not excused by her poverty, see 96 U. S., 618; 12 Am. & Eng. Enc. L., 556.

D. A. Scott, for appellant, Field.

It was not necessary for Field to examine any further than the deed from the trustee to Dunton. This showed the proper execution of the trust-deed and the performance of all the requirements therein contained. If there was any secret fraud between the trustee and the beneficiary, it cannot affect Field.

Appellee is estopped by acquiescence. 7 Smed. & M., 409; 55 Miss., 671; 66 *Ib.*, 61; 2 Lewin on Trusts, 873; 54 Am. Dec., 33; 58 *Ib.*, 136; 65 *Ib.*, 691; 68 *Ib.*, 340; 2 Am. St. R., 501; 8 *Ib.*, 661; 9 *Ib.*, 638.

J. H. Wynn, for appellee.

1. The following facts are charged in the bill and not denied: (1) that complainant received only about $1,600 on the loan, although it is claimed that $2,440 was due at the time of the sale; (2) that the alleged sale was conducted by Scott, who was the agent of Dunton, and that complainant was ignorant of the relations between these parties until just before filing the bill; (3) that the sale was made immediately

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Brief for appellee.

after a most disastrous overflow, when it was well known that the property would be sacrificed, and when it sold for only about one-fifth of its value; (4) that there were only four or five persons present at the sale, and only one bid was made; (5) that the complainant, being very poor, was then unable to contest the sale, but that she gave notice to Dunton, and every one else whom she thought proper, that she would contest it. These allegations, not being denied, must be taken as true, and testimony in opposition to them cannot be considered.

2. The trust-deed does not confer authority on the trustee to appoint another person to make the sale. It provides for the appointment of another trustee in certain contingencies, but manifestly it was contemplated that this appointment should be by the *beneficiary*, and not by Sherwood. 56 Miss., 126.

The mere ministerial act of posting notices and making the sale may be done by the agent selected by the trustee, as settled in *Johns* v. *Sergeant*, 45 Miss., 332, and *Tyler* v. *Herring*, 67 *Ib.*, 169. But if, in performing these ministerial acts, an exercise of discretion is called for, the trustee must be present to exercise it. Under the circumstances of this case, it was the clear duty of the trustee to adjourn the sale to prevent a sacrifice, yet he was not present to exercise discretion as to this. See 2 Perry on Trusts, § 602*u*; 26 Am. Dec., 536.

This case is clearly distinguishable from *Johns* v. *Sergeant* and *Tyler* v. *Herring*. Here the trustee committed the entire management of the trust to Dosh, who turned it over to Scott. This was a breach of confidence on the part of the trustee. It was for him to judge as to the time and manner of the sale. A trustee must act impartially, and with the utmost good faith.

It is no answer to say that Sherwood ratified the act of Scott. It is not shown that Sherwood knew Scott was the attorney of Dunton, or that Dunton had obtained a tax-title,

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Brief for appellee.

or any thing as to the circumstances of the sale. There can be no ratification without knowledge.

3. It being shown that the trustee was not present at the sale, and did not know that the recitals in his deed were true, it devolved upon defendants to show that the land had been properly advertised and the sale regularly conducted, as was held in *Tyler* v. *Herring*. It being shown that the trustee had no personal knowledge as to these things, the *prima facie* effect of the deed as to this is overcome. Here there is no evidence as to advertising the sale.

4. It was a condition precedent that the beneficiary should request the trustee to sell. 58 Miss., 130. The evidence fails to show that this was done. The trustee was not requested by the mortgage company to sell, and he could not request himself. He turned the entire matter over to the attorney, who had no authority to have the sale made. The notes were merely sent to New York for collection because they were payable there.

5. There was but a very small sum due when the sale was made, and there is no sufficient proof that the other indebtedness had been declared due by the beneficiary. The power to declare the debt due certainly could not be delegated. 56 Miss., 126. The defense attempted to be made, that the notes were declared to be due and a request made for the sale, is unfounded.

6. The sale was managed and conducted by Scott, who was the agent of the purchaser. A trustee cannot buy at his own sale, either for himself or another. Perry on Trusts, § 602; Lewin on Trusts, p. 486, § 83; 90 Am. Dec., 67. The opportunity for fraud is so great that the court will not stop to inquire whether there was actual fraud or not, but will set aside the sale without investigation where the duty of the trustee has been violated as to this.

7. The bill charges that Dunton was instrumental in bringing about the sale. The land was worth five times the amount for which it was sold. The loan had been made through

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Brief for appellee.

Sherwood, as agent of complainant. He had purchased at a tax-sale, and he was a member of the Corbin Banking Company, and Scott was his attorney. Every person connected with this sale was an agent or attorney of Dunton. The land was sold immediately after a disastrous overflow, when it was known that an attempt to realize any thing like the value of the property by a sale would be farcical. The costs and charges were piled up so that the amount, which originally was $1,600, had become $2,440. Sales under a power of this kind are harsh modes of foreclosing, and they are scrutinized with the greatest care, and will not be sustained unless conducted with fairness, regularity and scrupulous integrity. 2 Perry on Trusts, § 602*x*; 62 Miss., 668.

Dunton could not be a *bona fide* purchaser. He was bound to see that every thing necessary to the execution of the power had been done. 2 Perry on Trusts, 602*g*; 85 Am. Dec., 564; 99 *Ib.*, 562.

8. There was no such laches as will bar complainant. She gave notice that the sale would be contested, and as soon as the facts were ascertained, and she was informed of her rights, the bill was filed. There can be no laches without knowledge of such facts as would put one on inquiry. 1 Perry on Trusts, § 230; 2 Pomeroy's Eq. Jur., §§ 917, 965.

Equity will not bar one on account of delay short of the statutory period, where no one is damaged by the delay. 1 Perry on Trusts, §§ 229, 230; 12 Am. & Eng. Enc. L., 572; 17 Am. & Eng. R. R. Cas., 207; 66 N. Y., 175; 54 Am. Dec., 132; 72 Mo., 503; 94 U. S., 506.

Calhoon & Green, on the same side,

Filed a lengthy brief discussing the evidence, and making substantially the following points:

1. The right to declare the debt due upon default in payment of interest was a *personal* privilege, which could be exercised only by the mortgage company. The evidence shows that this right was not exercised by it, and hence the trustee

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Brief for appellee.

had no power to sell. The affirmative act of the company in declaring the debt due was a condition precedent to the exercise of the power. Failure to do this was not a mere irregularity. *McGowan* v. *McGowan*, 48 Miss., 553.

2. The power conferred, being a personal privilege in the mortgage company, could not be assigned. *Clarke* v. *Wilson*, 53 Miss., 119; *Porter* v. *West*, 64 *Ib.*, 548; *Hartley* v. *O'Brien*, *ante*, 825.

3. If the authority to declare the debt due could be delegated, it could not be exercised by Sherwood, the trustee. He was the agent of both parties, and was required to act for the protection of both. 128 Ill., 129.

4. Where there is failure to comply substantially with the power of sale, no title passes. 52 Miss., 368; 60 *Ib.*, 21; 61 *Ib.*, 397; *Tyler* v. *Herring*, 67 *Ib.*, 169; *Hartley* v. *O'Brien*, *supra.*

5. As to mere ministerial acts, such as posting notices, the personal attendance of the trustee was not necessary. Here the power of selecting the *time* of the sale was a matter of discretion for the trustee himself to exercise. Having delegated this, there was such a variation from the terms of the deed as renders the execution of the power void. Under the circumstances, it was a harsh remedy to have sacrificed the property at the sale. The trustee should not have abandoned the execution of his trust in favor of the creditor.

7. The sale was void, because Scott, the attorney for the creditor, was also the attorney for the trustee in making the sale. 38 Miss., 546; *Byrd* v. *Clarke*, 52 *Ib.*, 623.

8. Dunton cannot claim to be *bona fide* purchaser, and is not shown to be one. A purchaser at a trustee's sale is charged with notice of all the facts attending the sale. Even if there were mere irregularities and not a defect of power, this would be true as to Dunton. This also disposes of his claim of laches on the part of Mrs. Sharpe; and, besides, Dunton does not set up the defense of a *bona fide* purchaser. It is clear from the record that the $2,440 was bid by Scott

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for the company, the conveyance being taken in the name of Dunton.

Where one purchases under a void exercise of a power, though the deed recites that the necessary conditions precedent have been complied with, the purchaser acquires no title, and cannot defeat the true owner through the lapse of time. *Bonner* v. *Lessley*, 61 Miss., 392.

It does not appear that Dunton paid any part of the bid, and it is plain, from all the evidence, that he was a mere figure-head, the sale being made to the mortgage company.

9. Immediately after the sale, and in ignorance of any irregularity, except the failure of the trustee to be present, complainant endeavored to repurchase, and offered to pay all charges. This was refused, whereupon notice was given Scott, who represented the company, that she intended to contest the sale. It was not until 1889 that she discovered the other facts affecting the validity of the sale. Soon after this the bill was filed. She is not estopped.

Argued orally by *J. H. Watson*, for appellant, and *M. Green*, for appellees.

CAMPBELL, C. J., delivered the opinion of the court.

The failure of the creditor to formally declare the whole debt due did not render its action, dealing with the notes and security according to its custom in such cases, nugatory, and that was quite sufficient. It spoke louder than words, and fully authorized its representatives in America to proceed with the collection of the debt in accordance with the deed of trust.

The personal attendance of the trustee at the sale was not necessary. It was allowable for him to act through others in advertising and auctioning the land. All that was necessary, was to comply with the deed of trust, and, if this was done with the sanction and approval of the trustee, it was as if done by him in person.

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The fact that Mr. Scott, who represented the trustee in advertising and selling, was empowered to bid a sum named for Mr. Dunton, did not incapacitate him to make the sale. This was no disadvantage to the grantor in the deed of trust, but the contrary, for, but for this, it appears that the land would have been sold for far less than it brought.

There is nothing to show that Dunton was instrumental in procuring the sale, or that he had any connection with it, except to buy the land at a fixed price he was willing to pay. The land was bid off for him at the sale for taxes, on the first Monday of March, three months after default in payment of the interest, due December 1, 1883. Why he thus purchased is left to conjecture. It seems probable that it was assumed that, as default had been made, the land would be sold for the debt, and, in anticipation of becoming its purchaser at a sale under the deed of trust, it was purchased at the sale for taxes; but, whatever the explanation, there is in this circumstance no ground for condemnation of Dunton's purchase at the sale in June.

It appears that the sale was made just after a disastrous overflow, with all the disadvantageous incidents of such a condition, and that the grantor asked for delay; but her default as to taxes and interest occurred before the overflow, and there is no ground for the belief that she would have averted the sale if the overflow had not occurred. It rather seems probable that she would not, as she failed, during the fall and winter preceding, to provide for the payment of taxes and interest then due or maturing.

There is nothing to suggest that the sale was not advertised as required. The complaint of the bill is, not that the time and place of sale were not duly advertised, by required notices properly posted, but that it was not done by the proper person. There is no allegation that the required notices were not given, and that was not a matter of dispute in the court below. If it had been, the conclusion is fully warranted that the complainant has no ground for complaint on that score.

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Contemporaneously with the sale, she did not make any such complaint, and cannot successfully make it now. She knew of the sale; sought to have it postponed; after it was made, endeavored to purchase the land, and, failing, threatened to contest the sale as invalid, on specific grounds other than a failure to give the prescribed notice. There was never a hint as to that. Therefore, upon the facts, independently of any presumption from the recitals of the deed made to Dunton, it may be assumed that there was due notice of the sale, as required by the deed of trust.

The utmost good faith, fairness and impartiality must characterize the execution of a power of sale in a deed of trust, or else the grantor may, by timely complaint, have it set aside. Tried by the highest standard, we have failed to discover in the facts of this case any ground for criticism of the sale or the action of any participant in it. We see in it nothing but the common occurrence of an unfortunate and helpless debtor, bound by a deed of trust duly executed, making impotent efforts to satisfy the creditor or obtain delay, and a creditor deaf to all appeals, and intent on dealing with the security given by the debtor according to its terms. Of this the debtor has no legal cause of complaint. To this end the deed of trust was made. Her misfortune in suffering the sacrifice of valuable property (pitiable as it may be, and exciting our sympathy), is but the experience of multitudes, and furnishes another instance of the truth of the saying of the wise man thousands of years ago, and as true now as then: "The borrower is servant to the lender." While sympathy may be indulged for debtors, the just rights of creditors must be upheld, and purchasers of property sold under deeds of trust must be protected in their legal rights. This is for the interest of debtors and all others.

The result would have been the same if the bill had been promptly filed, instead of more than five years after the sale. The delay is suggestive, but we decide the case without regard to that, although it is a circumstance often of great

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Brief for appellant.

weight in cases like this, and might be decisive in some cases on the question of acquiescence. The notice of purpose to contest the sale, given by the appellee soon after it was made, was on a specific ground, the only one then known to her or her solicitor, and did not relate to any other. The fact that Scott managed the sale, and bought for Dunton, and that the land was purchased by Dunton at the sale for taxes and that under the trust-deed, and that conveyances were made to him, were known, or might have been, contemporaneously. These matters were not concealed, but occurred openly. Nothing else is known now. The charge that Dunton procured the sale, or had any connection with it, except as buyer, is denied, and not sustained.

As we uphold the sale made to Dunton, it is not necessary to consider separately the attitude of Field, who purchased from him, and whose rights are protected in upholding the sale to his vendor.

Decree reversed, and bill dismissed at the cost of the appellee in both courts.

A. J. PAXTON *v.* W. E. KENNEDY.

ATTACHMENT FOR RENT. *Statutory remedy. Demand must be for rent.*

To entitle a landlord to the statutory remedy of attachment for rent, it is essential that his demand shall be for rent. An agreement of the tenant, as part of the expressed consideration of a lease, to pay as rent a debt which is not such in fact, will not change this.

FROM the circuit court of Sunflower county.

HON. R. W. WILLIAMSON, Judge.

The opinion contains a statement of the case.

Southworth, Paxton & Stevens, for appellant.

No matter what the debt consisted of, if it formed a part of the consideration of the lease, then it was rent, and the

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landlord had a lien for its collection. We know of no law which forbids one choosing the kind of security he may wish to give his creditor. He may give a mortgage or a bill of sale, and why not, if his situation as tenant permits it, give a rent lien to his creditor, the landlord? It was idle to include this indebtedness in the rent notes unless this agreement as to the way of securing the debt can be enforced. The whole amount is agreed upon as rent. If this way of securing the indebtedness is not to be allowed, where is the consideration for Paxton to divide the indebtedness and extend the payment for several years?

The construction given by the court below is manifestly opposed to the intention of the parties.

J. Holmes Baker and *C. C. Moody*, for appellee.

In no view has appellant a lien for the debt which he claimed as rent. The forbearance of the landlord to collect his debt of a previous year does not give him a lien on the agricultural products of the leased premises for the next year. A previously existing debt cannot be considered as advances or supplies in a succeeding year. Nor does the remedy by distress lie for its collection. *Lumbley* v. *Gilruth*, 65 Miss., 23.

COOPER, J., delivered the opinion of the court.

The appellee, being indebted to appellant several hundred dollars, leased from him for a term of years a tract of land, at a fixed rent of one hundred dollars per annum, and, at the same time and by the same writing, promised to pay to appellant, in five equal annual payments, the sum of his past indebtedness *as rent*, and also agreed to execute his notes for the agreed rent and for the antecedent debt, the exact amount of which was not then known, by which notes the said debt was to be stipulated to be paid *as rent*. The appellee was let into possession of the leased premises, but refused to execute the notes stipulated for in his contract. The appellant sued

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out an attachment for rent, including in his demand the sum of one hundred dollars, and also one-fifth of the sum of the antecedent debt. The tenant brought replevin for the property seized, and the landlord avowed, justifying the distress. On the trial, the appellant offered to prove that at the expiration of the first year the appellee paid, under his contract and according to its terms, both the sum of one hundred dollars and one-fifth of the antecedent debt, which evidence, upon objection of the plaintiff, was excluded. Verdict was had and judgment rendered for the landlord for the fixed sum of one hundred dollars, from which he appeals and insists upon his right to recover by distress the aliquot of the antecedent debt, according to the contract of lease.

The claim of appellant cannot be maintained. The right and the remedy of the landlord are established and fixed by the law, and rest upon the existence of the relation of landlord and tenant, and it is essential that the demand of the landlord shall be for the rent of the land. The agreement of the tenant to pay an antecedent debt as rent does not and cannot change its nature or bring it within the protection of the statute. A past-due debt is not rent, and calling it such, or agreeing that it shall be so treated and considered, cannot entitle the creditor to resort to the summary remedy for its collection. The contract of the debtor is but an ordinary promise to pay, and for its breach the creditor must resort to the usual remedies.

Judgment affirmed.

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Statement of the case.

DELTA BANK ET AL. v. OLIVER-FINNIE GROCERY COMPANY ET AL.

1. FRAUDULENT CONVEYANCE. *Notice to vendee. Collusion. Trust.*

Where an insolvent merchant, through the co-operation of the president of a bank, in falsely representing him to be solvent, was enabled to make unusually large credit purchases of goods, and soon thereafter sold all of his assets to the bank, in consideration of a small sum in cash and a large debt to it, and the president, who acted for the bank, knew that the purpose of the debtor, throughout, was to defraud his other creditors, the sale will be void, and, on a bill filed by such other creditors, the bank will be held a trustee for complainants of the property so acquired.

2. SAME. *Fraudulent vendee. Measure of liability. Creditors' bill.*

In such case, it is error to render a decree against the bank absolutely for the price agreed on for the goods between it and the debtor. It is answerable only for the fair value of the assets so acquired and disposed of by it, and the property still on hand should be sold under the decree.

3. FRAUDULENT VENDEE. *Bank. Personal liability of agent.*

It is also error in such case to render a decree against the president of the bank personally. His acts are to be deemed the acts of the bank; it, having received the benefit, should alone be charged as trustee.

FROM the chancery court of Leflore county.

HON. W. R. TRIGG, Chancellor.

This is a bill filed by certain creditors of Harry Lee, a merchant, to set aside a conveyance of his entire stock of merchandise, his real estate and all other assets to the Delta Bank, of Greenwood. The bill was filed against said bank and J. S. McDonald, its president, and John K. Otley, and seeks to hold them personally liable to complainants, the bank to the extent of the value of the property conveyed, and McDonald and Otley to the extent of the entire sum of complainants' debts.

The bill alleges that McDonald and Otley were secret partners with Lee in the mercantile business out of which com-

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plainants' debts arose, and sought, as such, to hold them personally liable. But the evidence failed to sustain this charge, and the bill, so far as it sought to hold Otley liable, was abandoned. The bill also alleged that when the conveyance was executed, and the debt to the bank created, the privilege tax paid by it was inadequate, and, further, that it had no power, under its charter, to take the conveyance. There was no proof introduced in support of these allegations, and, as the points are not argued in this court, it is not necessary to further notice them.

The right to relief is mainly predicated on the allegations that Lee made the conveyance with intent to defraud his creditors other than the bank, and that the bank had notice of his fraudulent intent; that when Lee was purchasing goods from complainants, the bank, through its president, McDonald, falsely represented that he was solvent and reliable, the purpose of both being that Lee should accumulate a large stock of goods, which he would turn over to the bank, and thus defraud complainants and other creditors, and that the sale to the bank was made as the culmination of such fraudulent scheme.

The answers of the defendants expressly denied all the allegations of the bill charging fraud or collusion. The record is very voluminous, but it is unnecessary, in view of the opinion, to state in detail the evidence, which was conflicting. It was shown that the aggregate of the indebtedness due by Lee to the complainants, nearly all of which was contracted just prior to the sale to the bank, exceeded $12,000. It was further shown that Lee was a young man and unmarried; that he came to Greenwood about a year before, having previously lived in Greenville; that McDonald had also lived in Greenville, and, both in that city and in Greenwood, had been on intimate terms with Lee; that in 1889 Lee, McDonald and Otley engaged in selling coal, operating under the name of Harry Lee & Co., but this business amounted to little, and was soon discontinued; that in November, 1889,

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Statement of the case.

Lee embarked in a small mercantile business, having a capital of $3,000, which was loaned to him by McDonald personally upon collaterals. About that time Lee, McDonald and Otley (McDonald being the president and Otley the cashier of the Delta Bank) conceived the plan of embarking as partners in a mercantile, brokerage and plantation supply business, but nothing definite was done, and, meantime, Otley went to Virginia on account of ill health, and did not return, and resigned his position in the bank. The plan for this partnership contemplated that the business should be done under the name of Harry Lee & Co., with Lee as manager, and was to be conducted in a store-house adjoining the Delta Bank building, and with an opening between the bank and the store-room. As stated, this scheme was abandoned, but Lee opened business in his own name in another store-house adjoining the bank, and constructed in a style similar to that which had been agreed on. As stated, Lee obtained the $3,000 capital for this business from McDonald, to whom he executed his note for that amount. The business thus begun was continued until early in the fall of 1890, during which time the stock of goods kept on hand ranged in value from $1,500 to $2,500, and this was shown to be sufficient for the business. During the fall of 1890, and up to November 24, the day of the sale to the Delta Bank, Lee had increased his stock of goods on hand until it inventoried $12,533. During the year he also had a retail whisky saloon which he carried on. The amount of stock carried in his whisky business rarely, if ever, exceeded $1,000. Lee also rented a hotel, and managed that in connection with his grocery store and saloon. The bill alleges that, up to the fall of 1890, Lee's business was profitable, and it was shown that during that year he built a residence, which he rented out. The evidence is conflicting as to where he obtained the money for this purpose, whether by a loan obtained from McDonald, or from the profits of his business.

The evidence showed that McDonald and Lee were inti-

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Statement of the case.

mate friends; that the former was frequently in the store, and in consultation with Lee; that Lee transacted all his banking and exchange business through the Delta Bank, and required all drafts connected with his business to be drawn through it; that McDonald, in the name of the bank, had frequently represented him to be solvent and reliable, and Lee was accustomed to refer creditors to the bank for reports as to his financial standing. Many letters, written by McDonald, in the name of the bank, to wholesale dealers, were introduced in evidence, and in all of them Lee was rated as prompt and solvent, and the letters were such as would be calculated to induce extension of credit to him. During all of this time, the books of the bank showed that Lee was largely indebted to it, and, among other debts held by the bank, was the $3,000 note above mentioned in favor of McDonald, which McDonald had indorsed to the bank. It was shown that many advances made by the bank to Lee were, in fact, made to and in the discharge of his indebtedness, and, on several occasions in the fall of 1890, the bank, through McDonald, made advances to Lee to save him from threatened attachments. It was shown that, on or about November 1, 1890, the bank advanced to Lee $4,000 at one time, upon Lee's representation that it was sufficient to pay all his indebtedness, and his promise to so use it. The bank held certain paper as collateral to secure the indebtedness due by Lee; but, shortly before the sale, permitted him to withdraw it all in order that the collaterals might be renewed, but the securities were never replaced. As a temporary expedient to secure the debt to the bank while these collaterals were in Lee's hands, he gave to McDonald a bill of sale of his entire stock of goods, but this was not made public.

It was shown in behalf of the defendants that, at the time Lee begun to expand his business, and until a short time before his failure, the town of Greenwood was growing rapidly, both in population and in its business; that it was the center of great business activity; that many houses were being

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Statement of the case.

built, and every thing gave promise of rapid and permanent growth for the town, and that, in thus enlarging his business and extending his operations, Lee was but following the example of many others; that in the fall of 1890 the town suffered a collapse, and that Lee, along with many others, was one of its victims. It was further shown that when McDonald realized that Lee was hopelessly embarrassed, and that he also deceived the bank as to the return of the collaterals, he consulted the attorney of the bank, who advised him that the bill of sale, taken to secure the return of the collaterals, was a nullity, and, further, that there was no ground of attachment; that, in this emergency, as the debt to the bank amounted to about $13,000, it was agreed between the bank and Lee that it would purchase his entire stock of groceries and liquors, and all his real and personal estate of every kind (which inventoried $17,353) for $14,000, the difference between the price thus agreed upon and the indebtedness to the bank, namely, $1,000, was paid to Lee in cash, and the purchase was consummated, and the bank took possession. It is unnecessary to set out all the facts and circumstances in evidence relied on by the complainants and defendants touching the question of the fraudulent intent of Lee, and McDonald's alleged co-operation and collusion with him. The court below held the sale to the bank to be fraudulent; that the bank, through its president, McDonald, had notice of the fraud, and participated in it. The decree recites the amount of the indebtedness due by Lee to the several complainants, and was against Lee, the bank and McDonald for the said amounts, being, in the aggregate, over $12,000; but the recovery against the bank was, in no event, to exceed the net price of the personal assets as agreed upon between the bank and Lee in the sale. The decree further ordered that the real estate embraced in the transfer to the bank be sold in satisfaction of the decree. From this decree McDonald and the bank have appealed.

Inasmuch as the briefs and arguments of counsel deal al-

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most exclusively with the issues of fact involved, they are omitted.

A. H. Longino and *Mayes & Harris*, for appellants.

Rush & Gardner and *J. E. Gwin*, for appellees.

Argued orally by *A. H. Longino* and *E. Mayes*, for appellants, and by *W. T. Rush* and *J. E. Gwin*, for appellees.

CAMPBELL, C. J., delivered the opinion of the court.

The decree must be reversed. It is not warranted by the pleadings and proof. The only aspect in which the bill is maintained is that the bank, by reason of the action of McDonald, in co-operation with Lee, was disabled to become the grantee, as against Lee's creditors, of his assets. The conclusion is irresistible that Lee's purpose was to defraud, and that the bank, through McDonald, is chargeable with notice of this design; and because of this, the bank was not a *bona fide* purchaser. Hence, the bank is to be held answerable to Lee's creditors for what it got by his fraudulent conveyance.

But the decree was improperly rendered against McDonald. He was, as to the transaction with Lee, the bank, and, because of this, the bank, not he, is chargeable, as trustee, of what was conveyed to it by Lee.

The decree is wrong in fixing the value of the property conveyed by Lee at the price agreed on between Lee and the bank, in view of the evidence that it was worth less. All that the bank is answerable for is the just value of property it disposed of, and property yet on hand may be decreed to be sold.

Decree reversed, and cause remanded, with direction for a decree to be made in accordance with this opinion, unless the complainants will take a decree here, as they may, for the sum shown by the evidence to have been realized by the bank from the assets conveyed by Lee to it, and for the sale of property in its hands, derived from Lee, not disposed of by it.

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Syllabus.

GEORGE F. ARCHER v. G. M. HELM.

1. EVIDENCE. *Facts not tending to prove issue. Irrelevancy.*

In ejectment for a strip of land, where there is a controversy between owners as to the location of a dividing line, defendant claiming that the line had been fixed by agreement, it is not competent to prove that, after this, when a certain survey was made, plaintiff purchased a strip on the other side of his tract equal to what he would lose by locating the controverted line according to such survey. This does not tend to prove the defense relied upon that the line was fixed by plaintiff's agreement.

2. WITNESS. *Cross-examination. Interest in result.*

In an action of ejectment for a strip of land, depending upon the location of a disputed boundary line, in order to show the interest of a witness, it is competent, on cross-examination, to prove that he has an agreement to fix the boundary line between defendant's land and his own according to the result of the suit.

3. EVIDENCE. *Knowledge of defendant. Circumstances admissible.*

Where there is a question as to whether defendant in ejectment cultivated land west of a certain line, and it is proved that he visited the place, it is admissible to show by the testimony of his tenants that they did so cultivate, although they do not say that he knew of their going over the line, and he testifies that he did not know of or authorize it. What knowledge he had is for the jury to say from all the circumstances.

4. RECALLING WITNESS. *Rebuttal. Repetition of testimony. Rejection.*

Where a defendant, as a witness, makes a certain denial, and, after plaintiff's testimony (which is contradictory of this) is closed, the defendant is again offered, not to explain or distinguish his denial, but merely to repeat it, there is no error in rejecting his further testimony.

5. BURDEN OF PROOF. *Affirmative defense. Proof of substantive fact.*

Whenever a defense rests upon a substantive fact, the determination of which adversely to the defendant, is not necessary to the establishment by the plaintiff of his case *prima facie*, then the burden of proving that substantive fact is on the defendant.

6. SAME. *Ejectment. Disputed boundary line. Parol agreement.*

In an action of ejectment growing out of a dispute as to the location of a division line, if the plaintiff shows that the land in controversy is within

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Brief for appellants.

the calls of his deed, and the defendant relies upon an alleged parol agreement, by which the line was fixed at the place contended for by him, the burden of proof is upon him to show such agreement, and it is proper so to instruct the jury.

7. SAME. *Parol agreement. Permanent location. Instruction.*

In such case, the parol agreement, to be valid, must, in effect, permanently locate the division line, and it is not error so to instruct the jury.

8. RENTS. *Mistake as to boundary. Occupancy. Estoppel.*

When defendant in ejectment occupies to a certain line, the plaintiff acquiescing therein under the belief that it is the true boundary, on discovering that he has title to land beyond this line, he is not estopped by such acquiescence from recovering rents of the defendant for his occupancy of the same.

9. EVIDENCE. *Res gestæ. Statements explanatory of conduct.*

Where defendant in ejectment claims that a boundary line in controversy was fixed by parol agreement, and, in order to show that he did not rely on this, evidence is offered to prove that defendant, with others, after the alleged agreement, employed a surveyor to locate this and other lines, it is competent for defendant to show, in explanation, that, immediately before the survey, being reluctant to have the same made, he informed a third person, who asked him to join therein, that he did not want the line between plaintiff and himself run, as he regarded it settled. Though occurring beforehand, and as an isolated fact, this is admissible as part of the *res gestæ*, and as qualifying the effect of defendant's accession to such employment. *Meek* v. *Perry*, 36 Miss., 190.

FROM the circuit court of Washington county.

HON. R. W. WILLIAMSON, Judge.

The facts are stated in the opinion. For a report of this case on a former appeal, when only a question of law was decided, see *Archer* v. *Helm*, 69 Miss., 730.

Campbell & Starling, for appellants.

1. The court erred in admitting the testimony of Fontaine that he was employed by appellant, Archer, in conjunction with Toombs and others, to make the survey in 1888. This testimony was incompetent and misleading. It did not go to show that Archer employed the surveyor to locate the line between Helm and himself. The purpose of the survey, as

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Brief for appellants.

Fontaine said, was to find the true lines and corners around the lands of these several parties. Helm was not a party to that employment, and the testimony did not tend to show any act or conduct on the part of Archer inconsistent with the existence of an agreement between Helm and himself locating the line in controversy.

2. The court erred in excluding the testimony of Toombs as to what Archer said with reference to the line between Helm and himself just before the employment of Fontaine to make the survey. If the fact that Archer employed Fontaine to make the survey was competent evidence, as tending to prove conduct on Archer's part inconsistent with the existence of the agreement settling the line, certainly his declarations, made at the time of the negotiation, to the effect that this line had already been located by agreement, was competent to limit and explain the effect of his conduct. An admission is to be taken as an entirety, with the qualifications which limit, modify or destroy its effect. 1 Greenleaf's Ev., § 201; *Insurance Co.* v. *Newton*, 22 Wall., 32.

3. The testimony to the effect that Helm, as soon as he learned the error in the location of the lines, bought a strip of land along his western boundary, we admit, is not very definite, yet we think it was as competent to prove an act on the part of Helm consistent with the fact that the line in controversy had been fixed by agreement, as Archer's act in employing Fontaine to make the survey was inconsistent therewith.

4. The court erred in admitting the testimony of J. H. Moore, to the effect that he had agreed with Archer that, in case he lost this suit, he would not hold Archer to the line fixed between them. In view of the instruction given for plaintiff, this testimony, without limitation, was calculated to prejudice the defendant's cause.

5. The court erred in admitting the testimony of Archer's tenants to the effect that they had cultivated land west of the agreed line. Archer had testified that no one, with his

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knowledge or consent, had done this, and it was not proved that he consented to such cultivation, or had knowledge of it.

6. The court erred in refusing to permit Archer to testify in rebuttal. No evidence as to the settlement of the line was offered by Helm until all the witnesses for defendant had testified thereto. In his testimony, Helm spoke of a conversation with Archer in regard to two dividing lines, as to which Archer had not been interrogated. The court held that the defendant had the burden of proof as to the agreement, and yet denied him the right of closing the evidence on that point.

7. The court erred in instructing the jury for plaintiff, that the burden of proof was on defendant as to the location of the line in question. The affirmative of the issue and the burden of proof was on the plaintiff from the beginning to the end. Only the weight of evidence shifted, and not the burden of proof. 1 Greenleaf's Ev., § 74, note *a*. There are no special pleas allowable in ejectment. Reliance on the agreement settling the disputed boundary was not in the nature of confession and avoidance, but of a denial of the allegation of the declaration that the land was located as claimed.

The instruction is also erroneous in telling the jury that the burden was on defendant to prove that the line was *permanently* located by the agreement. From the language used in the instruction, the jury was apt to infer that it was necessary that there should be embraced in the agreement the word "permanently." We admit that the line must have been intended as the permanent dividing line; but when defendant proved that it was agreed on, the presumption was that it was permanent, and the weight of evidence shifted to plaintiff to meet this presumption.

8. Plaintiff's instruction is also erroneous in telling the jury to find the rental value of the land from and including the year 1886 to the time of trial. According to plaintiff's own testimony, he agreed that Archer might occupy to the Gordon line until the true line should be located. If the line

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Brief for appellee.

was found to be at another place, Archer, under these circumstances, was not a trespasser. Besides, Archer took possession in the latter part of 1886, and the jury was instructed to allow for that year. See 9 Wend., 65.

Another view is that the instruction is erroneous because it excludes the idea that plaintiff was estopped by his knowledge of defendants' acts in improving the property with reference to the line. 49 Mo., 98.

9. The verdict is manifestly wrong. This court will reverse the judgment, and grant a new trial, where there are facts in evidence about which there is no dispute, which clearly show that the verdict is wrong, even though there be direct conflict in the testimony on the main point in issue. 37 Miss., 477.

Yerger & Percy, for appellee.

1. Appellant abandoned the claim that the land was located within the calls of his deed, and introduced testimony to show that there was uncertainty about the true line, which rendered the making of the parol agreement fixing it admissible. At any rate, the question as to whether the land was situated within the calls of his deed was fairly submitted to the jury, and the evidence in support of the verdict is overwhelming.

2. The court properly admitted the testimony of Fontaine as to how he came to make the survey of lines in the township where the land is situated. It was proper for plaintiff to show that the witness made the survey with no bias in his favor, and that he was employed by defendant. The employment of the surveyor subsequent to the time of the alleged parol agreement, was an important circumstance to go to the jury.

3. It was competent to prove that the witness, Moore, would gain a certain amount of land if the Gordon line should be established. According to appellant's theory, some novel doctrine of sanctity is to protect the interest of this

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Brief for appellee.

witness from the vulgar gaze, and he is to be permitted to masquerade as an unbiased witness when he had a direct interest in the result of the suit.

4. There was no error in admitting testimony that defendant's tenants occupied land west of the agreed line. It was for the jury to say, under the evidence, what knowledge the defendant had as to this.

5. The court did not err in excluding the testimony of the witness, Toombs, as to the alleged reasons that actuated Archer in the employment of Fontaine to survey the township lines. The *fact* that Archer did not join in the employment was competent, but the *reasons* that he may have assigned for not doing so were entirely irrelevant, and not admissible under any principle. It was mere hearsay. If it had been attempted simply to prove that Archer had for two years been claiming that the line had been agreed upon, the incompetency of the testimony would have been palpable. It cannot be smuggled in as an *attache* of the fact that Archer did not employ Fontaine. The reason does not strengthen the fact. The fact does not make the reason evidence.

6. The court properly refused to allow defendant to again testify after plaintiff's testimony was closed. When on the stand, he was asked about certain matters, which he flatly denied, and the parties were clearly at variance before the jury. Nothing prompted this effort to re-introduce defendant except the "last tag" principle.

7. The court will notice, from the similarity of the instructions given for plaintiff and defendant, respectively, that opposing counsel entertained substantially the same views as to the law of the case. The serious objections now urged to plaintiff's instructions have their origin largely in the untoward verdict of the jury.

It was proper to hold the defendant for rents. He did not claim that he was in possession of the land under Helm. He not only claimed to be the absolute owner, under his deed, up to the Gordon line, but believed his land extended to the

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Brief for appellee.

O'Hea line. He agreed, according to his evidence, to assert his claim only up to the Gordon line, and up to that line he held possession as owner, under his deed, openly and adversely to the whole world, and to Helm especially. As licensee, adverse possession could confer no title. 13 Am. & Eng. Enc. L., 547. The fact that each party believed he was in possession of his own land, and claimed title thereto, entitled the successful litigant to rents, and the unsuccessful one to the value of improvements.

7. It is not a valid objection to plaintiff's instruction that it imposed upon defendant the burden of proving that the dividing line should be permanently located. Counsel especially except to the using of the word "permanently." This is verbal quibbling. The burden of proof is imposed upon the party who alleges the existence of a fact necessary in the prosecution or defense of an action to establish it. 2 Am. & Eng. Enc. L., 649.

The word "permanently," to the use of which counsel so strenuously objects, is of the essence of the word "establish," used in his own instructions. The objection merely is to the jury being told that the defendant had to do what the law required him to do. There was no attempt by the defendant to prove an agreement as to the line, leaving the character and extent of that agreement to be presumed by the jury, but he squarely attempted to prove his case—the *establishing* of another boundary line.

As to the burden of proof, in the language of Lord Abinger, looking at these things according to common sense, we should consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered as the substance and fact of it. 2 Am. & Eng. Enc. L., 656.

There was no dispute about the defendant having taken possession of the land in controversy, but the assertion of there being an agreement made was contradicted. If an agreement had been made, defendant took and held posses-

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sion under it. The proof that he took possession beyond the Gordon line was pertinent, as showing that no agreement that his possession should go no farther than that line had been made.

8. Not only does the evidence amply sustain the verdict, but we contend that a verdict for defendant would have been unsupported. To deprive a man of his absolute right to the unquestioned fee to his land, it should appear clearly and distinctly, and without a shadow of doubt, that there was an express agreement between the owners of adjoining lands, deliberately settling the exact boundary line between them, and an acquiescence therein for a considerable length of time.

The judgment is right, and we ask its affirmance.

Argued orally by *R. B. Campbell*, for appellant, and *Leroy Percy*, for appellee.

MAYES, SPECIAL JUDGE, delivered the opinion of the court.

This is an action of ejectment growing out of a controverted boundary line in township 19, range 6 west, in Washington county. The line in question is that which divides sections 8 and 9. Several efforts have been made to fix this boundary. Some considerable time before this action was instituted, two certain surveys were made, resulting in what are known as the O'Hea and the Gordon lines, of which the latter is a chain or two eastward of the former.

Stating approximately, and with sufficient accuracy for the purposes of this case, it may be said that the lands of the plaintiff below lie in section 8, and, consequently, to westward of the disputed line, while those of the defendant lie in section 9 and to eastward of the said line. The defendant maintained the correctness of the O'Hea line, and the plaintiff asserted that of the Gordon line. It is not, however, out of these lines that the controversy arises; but the understanding of them is necessary to the comprehension of one assignment of error. It is also necessary to note that the lands of

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one John Moore lie in section 10, and therefore still farther eastward of this boundary line—a mile away from it—and next eastward of the defendant's lands. The line composing the southern boundary of all these lands is free from controversy.

It seems that the said Moore was desirous of improving his lands in section 10. The spot upon which he wished to erect his buildings lay in the extreme south-western corner of his supposed tract; and, should he place the improvements there, he feared they might be imperiled, because the proper location of the line between himself and the defendant was in doubt. That location was considered to depend on the other question as to whether the O'Hea line or the Gordon line was the true boundary between sections 8 and 9, the corners made by those lines with the southern boundary of that tier of sections being regarded, one or other, as the proper starting point from which to seek for the line between sections 9 and 10.

In this state of affairs, on a certain occasion, in the year 1886, a verbal agreement was made between this Moore and the plaintiff, and the defendant, at the suggestion of the plaintiff, who was a mutual friend of the other two, and was himself an expert surveyor, that the Gordon corner, as they call it (that is, the intersection of the Gordon line with the undisputed southern boundary line aforesaid), should be taken for the true corner from which to establish the lines between sections 8 and 9, and between sections 9 and 10. Plaintiff claims that this agreement was only a provisional one, to control only until a final and definite survey should settle the true line; and, further, that, if by such survey it should appear that Moore had gotten any of what is really Archer's land, then Moore was to compensate Archer by an equal quantity of land elsewhere. Moore and the defendant, Archer, on the other hand, claim that the agreement was for a permanent establishment of said two boundary lines, irrespective of the result of any future surveys. And this is the turning-point in the case.

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Opinion of the court.

In 1887, the next year after said agreement was made, one Porterfield made another survey, which located the line between plaintiff and defendant 14 chains and 42 links still farther eastward of the Gordon line; and this survey was verified by another made by Fontaine, in 1888. Thus, it was shown that, if these surveys be correct, defendant was occupying as his own $118\frac{50}{100}$ acres of land which belonged, in fact, to the tract of plaintiff, and which even plaintiff had always theretofore considered to be certainly the defendant's, since their controversies had been over the strip between the O'Hea and Gordon lines, lying wholly to westward of the latter.

Availing himself then of the disclosures made by the Porterfield and Fontaine surveys, the plaintiff, in December, 1888, brought this action against defendant to recover the strip between the Gordon line and the new line of Porterfield, and the rents thereof for the year 1882 and subsequently.

Plaintiff's declaration, of course, described the land as lying within the calls of his deed. Defendant pleaded non-possession, with notice of valuable improvements. On the trial, plaintiff recovered, and had judgment for the land and for $109.60, excess of rents over improvements. Hence, this appeal by the defendant below, Mr. Archer.

None of the assignments of error, of which there are several, are well taken, except the second. But since on the second the case must be sent back for a new trial, we shall briefly dispose of all the assignments, in order that the new trial may be disembarrassed of the questions therein raised.

The real controversy below was, not so much over the question as to whether the land in litigation was within the calls of plaintiff's deed (for that seems to be no longer denied), but over the claim by defendant that the Gordon line had been, by parol agreement, adopted as the permanent boundary. Plaintiff claimed that it was only provisional, as stated above. On the other hand, it is not denied by the plaintiff that suffi-

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cient incertitude as to the true boundary had existed to make binding such verbal agreement, if any such were made:

The testimony of the surveyor, Fontaine, was offered by plaintiff, to show that he was employed by Archer and others to make the survey made by him, from which employment the inference of fact was invoked that Archer did not himself regard the Gordon line as final. This testimony was objected to by Archer, for the assigned reason that it does not appear that Fontaine was employed to run this particular line. We, however, hold that, by Fontaine's testimony, the employment was sufficiently connected with the line in dispute to make it competent, and, consequently, that the court did not err in this respect.

The defendant offered to prove by the plaintiff, on cross-examination, that, after the Porterfield survey had shown the Gordon line to be too far west, plaintiff himself purchased a strip of land along his western border as fixed by the Porterfield survey, in order to protect himself from encroachments by parties lying to westward of him. The idea seems to be that such purchase by the plaintiff argues that he had himself been relying on the alleged agreement fixing the Gordon line as the permanent boundary. We do not see how such a conclusion can be reached from such premises. The furthest the argument can go logically is that the plaintiff must have thought the Gordon line to be the true one. But he does not claim ever to have thought otherwise before the running of the Porterfield line. The Gordon line was the one he always contended for, while the defendant contended for that of O'Hea. We hold that the testimony offered does not even tend to prove the *agreement* relied on, and that the court excluded it rightly.

J. H. Moore, mentioned above, was a witness for the defendant. On cross-examination, the plaintiff proved by him that, by virtue of the agreement fixing the lines as aforesaid, his section of land would gain fourteen chains in width; and, further, that he had an understanding with the defendant

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that, if the defendant should lose this suit, he, Moore, would not hold defendant to that agreement, but that defendant was to fall back on Moore. This examination was objected to by Archer. We hold that it was proper. The direct object and effect of it was to show that Moore was himself interested in the maintenance of the Gordon line, and was directly interested in the result of the suit.

We hold, also, that the testimony of Dunbar and of Hall, tenants of Archer, to the effect that they had cultivated lands to westward of the Gordon line, was correctly admitted. True, these witnesses do not state that Archer knew of their transgression; and he testifies that he did not. But they do show that they cultivated no farther than was done by the tenants who preceded them; that it was over the line, and that Archer visited the place. These are circumstances, whether strong or weak is unimportant here, which the jury might well consider on the question of Archer's knowledge, and his own adherence to the Gordon line.

The defendant testified, and on cross-examination he was asked about a certain proposition made to him by the plaintiff about confining themselves respectively to the O'Hea and the Gordon lines. He denied that such a proposition was made. The plaintiff testified in rebuttal, and testified that he did make such a proposition. After the plaintiff rested his case in rebuttal, the defendant offered to "rebut" this statement of the plaintiff's, but the court refused to permit it. The defendant's offer is not shown by the record to have been any thing more than a mere wish to take the stand and repeat his denial. He did not offer to explain his denial, or to distinguish in any way. We cannot say that the court erred.

The only instruction given for the plaintiff was as follows: "The court instructs the jury for the plaintiff, that if they believe from the evidence that the land in controversy is located within the calls of Helm's deed, that is, in the northwest ¼, section 9, and in section 8, township 19, range 6, they will find for the plaintiff for the land, and the rental value of

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it from and inclusive of 1886 up to the present time, the defendant being entitled to the value of such improvements as he has made upon said lands prior to the institution of this suit, December, 1888, unless they believe from the evidence, and the burden of proving this is upon the defendant, that plaintiff and defendant made an agreement that the line dividing their lands should be permanently located according to the Gordon survey, that they mutually agreed to this, and defendant took and held possession of the land in controversy under said agreement."

To this instruction three objections are made: First, that it places on defendant the burden of proving the parol agreement relied on. It is urged that a distinction exists between the burden of proof and the weight of evidence; that while the latter shifts from time to time as the trial progresses, the former never does; and that, while in this trial the defendant had to produce the weightier evidence in order to be entitled to a verdict, the burden of proof was not on him. 1 Greenleaf's Evidence, § 74, note, is cited to sustain this contention; but we cannot take that view of the law. Such a distinction is made in the cases cited by Mr. Greenleaf, of which the principal is *Central Bridge Corporation* v. *Butler*, 2 Gray, 130. A critical reading of that case will show that it concedes expressly that no such distinction obtains in regard to those defenses which are essentially affirmative, such as payment or release; but that it is asserted in regard to those which are essentially traverses of some necessary allegation of the declaration, and to those only. Perceiving this fact, counsel ingeniously endeavor to meet the requirements of the case by maintaining that the defense here made, which is the parol fixation by parties of a conventional boundary, falls within that category, and is essentially naught but a denial of the averment in the declaration that the defendant wrongfully deprives the plaintiff of possession. But we must decline to follow the Massachusetts cases. They seem to us to insist on a distinction which leads to no practical difference. If the

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defendant must show the preponderance of the evidence in order that his defense shall be successful, what simpler expression can be found to characterize his predicament than the familiar one that the burden of proof is on him? That is the fact; why not so phrase it? We hold the true rule to be this: That whenever the defense rests upon a substantive fact, the determination of which adversely to the defendant is not necessary to the establishment by the plaintiff of his case *prima facie*, then the burden of proving that substantive fact is on the defendant. Of course the defendant may make use, in meeting this burden, of any evidence in the case, by whomsoever produced. The Massachusetts rule, logically applied, would deny that the burden of proof is on the defendant who pleads payment to a suit on a note, for that plea is essentially a denial of the necessary averment in the declaration that the note had not been paid.

The second objection to the instruction is the use in it of the word *permanently*. The idea is, that from such language the jury "was apt to infer that the defendant had to prove that the agreement contained the words of the instruction, or, at least, that it contained the word 'permanently.'" We hold that the objection is not well taken. In order that a parol agreement be valid, it is necessary that it shall, in effect, permanently locate the disputed line. It cannot be erroneous to instruct the jury in apposite terms as to such necessary legal effect. If the question be one of delicacy, and the party have reason to fear that the instruction may be misunderstood and misapplied by the jury, he may easily ward off that danger by an explanatory instruction. This is common practice.

The third objection to the instruction is, that, by it, the jury is directed to find rents from the year 1886, inclusive. The argument is that, according to plaintiff's own showing, he agreed, in 1886, that the defendant might occupy up to the Gordon line until the true line should be determined; that this was not done until some time in 1888; consequently,

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during that period, that defendant was not a trespasser, and, therefore, not liable for rents. It must be observed, however, that, during all of this time, the defendant held up to the Gordon line, not by plaintiff's license, but under and by his own claim of title. Plaintiff was wholly ignorant of the fact that his premises ran east of the Gordon line, embracing the lands now in controversy, and, so far as is shown, never suspected it. The true and only dispute between him and the defendant was, as to whether the lands of defendant did or did not extend westward of the Gordon line, so as to embrace the strip between that and the line of O'Hea; and the only agreement between them, while in form an agreement that defendant should improve up to the Gordon line, was, in its substance, nothing but a restriction of the defendant from a transgression of the Gordon line; and so it was understood by them. Archer never did understand himself to be holding the *locus in quo* by the consent of Helm, but always that he held it under his deed, and without any reference either to the dispute or the agreement. The fact that plaintiff, in common with all others, considered either the O'Hea line or the Gordon line to be the true boundary between sections 8 and 9, and, consequently, never objected, or, as defendant puts it, consented, to defendant's occupancy up to the Gordon line, cannot estop him, on an unexpected discovery of his true right, to claim rents for lands still eastward of that line. His consent was none other than that given by every man who acquiesces in the occupancy by an adverse claimant, and who is ignorant that he has a title to the premises so occupied.

The error for which the case must be reversed is this: The surveyor, Fontaine, had testified that he had been employed by Archer and others to make the survey of which he testified, and which was made some two years subsequently to the making of the agreement relied on by Archer as a permanent fixation of the disputed line. The effect of this testimony of Fontaine's, and the only thing which made it com-

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petent, was to disprove the claim that Archer regarded the line as already established. It was necessary to avoid that effect in some way; and, in order to do so, Archer offered to prove by one Dr. Toombs that Archer refused to Toombs to participate in the employment, assigning to Toombs as a reason that he regarded the line as settled. The court refused to allow Toombs to give the reasons assigned by Archer for not entering into the arrangement for the survey.

In order to develop this point fully, it is best to state that Fontaine had testified that he was employed by Dr. Toombs, Mr. Moore, Dr. Shackleford and Mr. Archer; that he first spoke to Toombs, Shackleford and Moore—afterwards to Archer; that he did not know that they were all present at one time, but that he afterwards got two letters from Moore, naming the parties who wanted him to do the work. Dr. Toombs testified that Mr. Archer hung back very much; that he was disinclined to take part in the survey, and in that connection the aforesaid offer was made to prove his assigned reasons for that disinclination. It is true that this declaration of Archer's was made to Toombs, and not to Fontaine, and it is true that it was made prior to the employment, and not at the exact time of the employment, as an isolated fact, yet still we hold that it was competent as part of the *res gestæ*.

The testimony shows that, in fact, Archer had very little to do with the actual employment of Fontaine; that was done mainly by the two men, Toombs and Moore, acting for the others. It also must be stated that the testimony of Fontaine, which connects his employment with the line in controversy at all, and which saves the case from reversal on the first assignment of error, is vague and doubtful in expression. The fact of the employment by Archer is not of the gist of this case, but is only competent as an evidential circumstance, in the nature of an admission inconsistent with the claim now made by him as to the scope of the agreement insisted on. All of these considerations lead us to the con-

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clusion that his declarations made to Toombs during the negotiation for the employment, announcing his disinclination to participate, and giving his reasons therefor, should have been allowed to go to the jury for the purpose of qualifying or limiting the effect of his accession to the employment. If the fact is put in evidence against him as an admission, then the whole truth in respect to the matter should have been given.

The difficulty of formulating any exact rule by which the admissibility of such declarations as a part of the *res gestæ* shall be determined has been a source of frequent perplexity to the courts, and a cause of common lamentation to the judges and the text-writers. The inherent difficulty of the subject, and the necessity of referring each case to its own particular circumstances, are universally recognized. The declarations in question must not be mere narratives of a past occurrence, but must have been made at the time of the act done which they are supposed to characterize; and they must be well calculated to unfold the nature and quality of the facts which they are offered to explain, and must so harmonize with them as obviously to constitute one transaction. But, while such declarations must be made at the time of the act done, that rule is not pressed to the extent that they must be precisely concurrent in point of time. If the declarations spring out of the transaction, if they elucidate it, if they are voluntary and spontaneous, and if they are made at the time or so near to it as reasonably to preclude the idea of deliberate design, and they be not a narrative of a past occurrence, they are then to be regarded as contemporaneous. And, in this connection, the negotiation of a transaction is regarded often as a part of the fact itself; and here the declarations offered were made as part of such negotiation for the employment, and to a person who was prominent in inducing Archer to take part, and was prominent in the actual employment when made. For these reasons, we hold that the court below erred in excluding this testimony. *Meek* v. *Perry*, 36 Miss.,

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Statement of the case.

190, 260; Wharton on Evidence, §§ 258, 259; *Bank* v. *Kennedy*, 17 Wall., 19.

Reversed and remanded.

Owing to the necessary absence of the HON. THOMAS H. WOODS, one of the judges of this court, by agreement of the parties, Mr. Edward Mayes, a member of the bar, was selected to sit in his place in the decision of this case.

W. J. QUARLES ET AL. *v.* C. H. HIERN.

1. JUDGMENT. *Attack. Want of notice. Clear proof.*

One alleging want of notice, in attacking a judgment against himself which is apparently valid, must make the clearest and most convincing proof. *Duncan* v. *Gerdine*, 59 Miss., 550.

2. EXECUTION SALE. *Want of proper notice. Bona fide purchaser.*

That at execution sale land is not properly advertised, will not affect the title of a purchaser who has no notice of the irregularity. The fact that the defendant gives a notice at the sale that the *judgment* is void, and that, therefore, the sale will be contested, will not change this. *Natchez* v. *Minor*, 4 Smed. & M., 602.

3. SAME. *Purchase by judgment creditor. Notice.*

It is otherwise if the judgment creditor purchases. He is charged with notice of irregularities.

4. CHANCERY COURT. *Illegal execution sale. Relief against.*

If at an execution sale, which is not advertised for the time required, the judgment creditor purchases property at a sacrifice, on timely application, the debtor, if there has been no waiver, may have relief in equity against the sale.

FROM the chancery court of Harrison county.

HON. W. T. HOUSTON, Chancellor.

On May 9, 1891, appellant, Dale, recovered judgment in a justice court against appellee, Hiern and wife, on a promis-

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Brief for appellants.

sory note for $187.43. The judgment recites that it was rendered by consent. The constable's return showed that process was served personally on the defendants. Execution was issued, under which certain land of the defendant, C. H. Hiern, was levied upon, and sold August 3, 1891, appellant Dale, the judgment creditor, purchasing a part thereof, and appellant Quarles the remainder.

On February 2, 1892, Hiern filed the bill in this case against Dale and Quarles, alleging that said judgment was void for want of notice; that the process upon which it was based was not served; that there was no appearance, and that neither he nor his wife consented to the entry of the judgment. The complainant also alleged that he caused public notice to be given at the sale that the judgment was void; that purchasers would get no title, and that the sale would be contested; and it was further alleged that the property sold for greatly less than its value. It was also alleged that the advertisement of sale was not published for the length of time required by law. Complainant averred his willingness to pay the amount due on the note, with interest and costs, and prayed that the sheriff's deeds be canceled.

After demurrer overruled, the defendants answered, denying the material allegations of the bill, denying that the judgment was void, and averring that they were purchasers without notice of defects, if any existed. Testimony was taken, and a decree was entered in favor of complainant, directing the cancellation of the deeds of both defendants, on payment by complainant of the amount due on the note, with interest and costs. From this decree defendants appeal. The opinion contains a further statement of the case.

Nugent & Mc Willie, for appellants.

1. The evidence shows conclusively that the summons was served. Besides, there is a presumption in favor of the truth of the record which must prevail. *Railway Co.* v. *Bolding*, 69 Miss., 255.

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Brief for appellants.

2. This is a collateral attack. No fraud is charged, and the court had no authority to inquire into the truth of the return. *Cully* v. *Shuck*, 30 N. E. Rep., 882. In a proper proceeding, the evidence to vacate the judgment must be clear. *Wilson* v. *Shipman*, 52 N. W. Rep., 576. Had appellee proceeded in the justice court, there might have been some reason for entertaining his suit. He preferred to go into equity to set aside the execution sale based on a judgment in all respects regular, on the ground that there had been no service of process, and, at most, has shown but a bare possibility or probability that he was not served.

3. The allegation that the sheriff failed to properly advertise the execution sale is of no avail. *Minor* v. *Natchez*, 4 Smed. & M., 602. The officer derived his authority to sell from the judgment and execution, not from the advertisement. If he fails to give the proper notice, the remedy is by an action against him.

4. But the notice of sale was sufficient, and it is immaterial that one week it appeared in the supplement of the paper. One would be more apt to read the notice in the supplement than elsewhere; the flutter of the detached document, as the paper is opened, would necessarily attract attention. If, however, this be considered an irregularity, we do not think it will affect the title of appellants. *Doe* v. *Pritchard*, 11 Smed & M., 327; *Winston* v. *Otley*, 25 Miss., 451.

Quarles was not a party to the execution. As to Dale, the plaintiff, a different rule might be applied. *Frink* v. *Roe*, 11 Pac. Rep., 820. This, however, can hardly be true, because the defendant's attorney, by asking the sheriff to defer the insertion of the notice in the regular paper, brought about the very state of case now relied on to defeat the sale. Time was granted as a benefit to defendant.

No counsel for appellee.

Argued orally by *W. L. Nugent*, for appellants.

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Opinion of the court.

COOPER, J., delivered the opinion of the court.

The decree in this cause must rest, either upon the fact found by the chancellor, that Hiern was never served with the process issued by the justice of the peace by whom the judgment in favor of Dale and against Hiern was rendered, or upon the other fact found by the chancellor, that there were irregularities in the sale, by reason of which it should be vacated. The decree is silent as to the facts found by the court. Being general in its terms, and the appellee not being represented in this court, we are not advised upon what ground the decree rests.

A careful scrutiny of the record fails to disclose a case for relief, upon the ground that the process upon which the judgment was rendered was not, in fact, served upon the defendant. True, the complainant swears that the process was not served, but, opposed to his testimony, is the presumption of due performance of official duty by the constable, his return made at the time showing personal service of the writ, his testimony that, in fact, the service was made as returned, and the evidence of the justice of the peace, that, on the return-day, he met Heirn, who told him he had no defense to the suit, and directed him to enter judgment.

While one against whom a judgment is rendered without notice, may have relief upon disproving the return of the officer, it is incumbent upon him to make clear and convincing proof. It will not be sufficient, if, on the whole case, the matter is left in doubt. Some faith and credit must be given to the acts of sworn officers, and to the returns they make in reference to the discharge of their official duties, and only the clearest and most convincing evidence should be accepted by courts as sufficient to disturb judgments apparently valid and regular. *Duncan* v. *Gerdine*, 59 Miss., 550.

It does not appear that Quarles, who, at the execution sale, became the purchaser of a part of the land, had any notice of the irregularity of the published notice of sale. The complainant avers that, at the sale, he caused notice to be

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given that the judgment under which the officer was proceeding was invalid, and that the sale would therefore be contested. But there is no suggestion, either in the pleadings or evidence, that objection was made because of any irregularity in the publication of the notice of sale, or that Quarles had any notice of such irregularity. Under such circumstances, he was entitled to act upon the assumption that the officer had discharged his duty in making the publication, and, though irregularities may have existed in the publication of the notice, his title acquired at the sale cannot be affected. *Lum* v. *Reed*, 53 Miss., 73; *Hanks* v. *Neal*, 44 *Ib.*, 212; *Minor* v. *Natchez*, 4 Smed. & M., 602; Freeman on Ex., § 286.

As to the purchase by Dale, the judgment creditor, a different rule applies. It was his process under which the sale was made, and the defective publication was the result of the failure of the officer acting for him to perform the duty imposed by law for the protection of the rights of the defendant in execution. In a direct proceeding to attack the sale, as is this, we think a different rule than that applicable to purchases by third persons should control.

If the complainant had appeared at the return-term of the execution, and there moved to vacate the sale, and had shown, as he now does, that property worth four hundred dollars had been sold for forty dollars, and that the sale had not been advertised for the time fixed by law, it would have been proper for the law court to afford relief. The same rule should be applied in equity, where seasonable application is made for relief, and when the complainant has done nothing to waive his right. *Collins* v. *Smith*, 57 Wis., 284.

We do not decide that the publication of a notice of sale in the supplement of a newspaper is not a publication in the paper as required by law. We think the evidence here is insufficient to show that there was a publication in any regular supplement of the newspaper on the eleventh of July. What is copied in the record as the supplement, contains

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Statement of the case.

nothing except the notice of sale, and there is no suggestion in evidence that it was sent out with the edition of that date. On the contrary, the sheriff, who was introduced as a witness for the defendants, distinctly stated that the first publication was made in the paper of the eighteenth, and gave as a reason for his neglect to advertise on the eleventh, an agreement with counsel for appellee that publication on the eighteenth, twenty-fifth and first should be recognized as legal.

The decree of the court below is reversed on the appeal of Quarles; otherwise it is affirmed. Costs of this appeal to be divided between appellant, Dale, and the appellee.

E. GIARDINA *v.* THE CITY OF GREENVILLE.

1. MUNICIPAL ORDINANCE. *Violation. Placing goods on sidewalk. Sufficiency of charge.*

   Under an ordinance making it unlawful to place any goods on a sidewalk, an affidavit charging defendant with obstructing a sidewalk by allowing barrels to *remain* thereon, without averring that he placed them there, charges no offense.

2. SAME. *Strictness. Articles designated. Ejusdem generis.*

   An ordinance which prohibits placing on a sidewalk "straw, chips, dirt, shells, tin cans, iron hoops, swill, nails, iron, glass, fruit peelings, melon rinds, shavings, rags, hair or such rubbish," is not violated by allowing *barrels* to remain on the sidewalk, obstructing it. Though they may contain the things mentioned, or have iron hoops and nails in their make-up, barrels are not embraced in the enumeration.

FROM the circuit court of Washington county.

HON. R. W. WILLIAMSON, Judge.

Appellant was convicted in the mayor's court on an affidavit, as follows:

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Brief for appellant.

"THE STATE OF MISSISSIPPI, WASHINGTON COUNTY, *City of Greenville.* } Personally appeared before me, mayor of said city, W. H. Neal, who, being duly sworn, deposes and says that in said city, on the twenty-ninth day of October, 1892, one E. Giardina did obstruct the public sidewalks and streets in said city, in front of his store on Washington avenue, by allowing and permitting certain barrels to remain thereon, in violation of the ordinance in that behalf, and against the peace and dignity of the city of Greenville."

Section 1 of the ordinances of the city of Greenville provides that it shall be deemed a misdemeanor to do, or cause to be done, any of the following acts:

"(26) To place in or upon any sidewalk any goods, wares or merchandise or poultry or other thing of any kind or character whatsoever, or to exhibit on said street any goods or other things for sale or show.

"(40) For any person to place any straw, chips, dirt, shells, tin cans and iron hoops, swill, nails, iron, glass, fruit peelings, melon rinds, shavings, rags or hair, whether offensive to health or not, and whether it amounts to an obstruction or not, or to permit any such rubbish to be thrown by others, or to remain in front of one's house or business place in any street, alley or sidewalk of said city."

An appeal was taken to the circuit court, where a motion was made by defendant to quash the affidavit, on the ground that it charged no violation of the ordinances. This motion was overruled, and the defendant was again convicted. Hence this appeal.

Wasson & Wasson, for appellant.

The affidavit is claimed to have been made for a violation of paragraph 26, § 1, page 44, of the ordinances of the city of Greenville. The ordinance, being penal, must be strictly construed. Nothing can be added by implication. *State* v. *Nichols*, 39 Miss., 318.

The ordinance does not make it a misdemeanor to *permit*

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any thing to remain on the sidewalk. To constitute a violation, there must be a *placing* upon the sidewalk some of the things forbidden.

Neither does the ordinance provide against the obstruction of the streets by placing such articles thereon.

It is not contended that appellant placed the barrels on the sidewalk, or directed them to be placed there, or that he even knew that they were there. The charge is simply that he permitted the barrels to *remain* on the sidewalk, and this is no offense under the ordinance. Nothing short of charging appellant with placing upon the sidewalk the articles forbidden would show a violation.

O. H. Perry and *J. M. Jayne*, for appellee.

This case comes clearly within the provisions of the charter of the city of Greenville, under which the ordinance in question was adopted. The ordinance is paragraph 40 of § 1, and is to be found on page 45 of the charter and ordinances of the city. A fair construction of the charter and ordinance referred to leaves no doubt whatever that the judgment is correct, and it should be affirmed.

CAMPBELL, C. J., delivered the opinion of the court.

Tried by the ordinance under which the appellant's counsel says the affidavit was made and the conviction had, the affidavit is bad, and tested by the ordinance relied on by the counsel of the appellee to sustain the conviction, the affidavit is not good, and the motion to quash should have been sustained. The thing mentioned in the affidavit ("barrels") is not charged to have been *placed upon* the sidewalk by the defendant, and therefore the offense denounced by the twenty-sixth clause, page 44, of the charter and ordinances of Greenville is not charged; and barrels are neither "straw, chips, dirt, shells, tin cans, iron hoops, swill, nails, iron, glass, fruit peelings, melon rinds, shavings, rags, hair, or such rubbish," although they might contain such things, or have iron hoops

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around them, and nails in their make-up, and therefore the affidavit does not charge a violation of the fortieth subdivision on page 45 of the charter and ordinances. We assume that these are the only provisions of the ordinances applicable, as no other is invoked by either party.

Reversed, and remanded for further proceedings in accordance with law.

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ACCOUNTING.

Building and loan association. Diversion of profits.

A bill by a borrowing member against a building and loan association, for an accounting, alleged that the premiums and profits of the series to which he belonged, and to which, under the charter, at the time of the contract, he was ratably entitled, by a vote of the stockholders, from which borrowing members were excluded, had been diverted from that series and applied to the equal benefit of other and subsequent series, and that this action deferred the maturity of complainant's stock, causing him loss. *Held*, error to sustain a demurrer to the bill. *Sullivan* v. *Building & Loan Association*, 94.

ACTION OR SUIT.

Practice. Usee in action ex delicto. Irregularity.

An action of damages against a railroad company for killing animals on its track, being *ex delicto*, should not be brought in the name of one for the use of another. And in an action so brought a recovery against the defendant will not be disturbed for want of proof that the usee had an interest in the suit. His connection with the case will be disregarded in passing upon the correctness of the verdict. *Railroad Co.* v. *Cantrell*, 329.

ADMINISTRATION.

See ESTATE OF DECEDENT.

ADVERSE POSSESSION.

1. *Husband and wife. Joint occupancy. Title.*

Where a husband has conveyed land to his wife, although confessedly in fraud of his creditors, and they continue, as before, to occupy it together as their home, their joint possession will be referred to her title, and, after her death, he cannot claim, as against her heirs, that his possession was adverse to her. *Claughton* v. *Claughton*, 384.

2. *Non-resident. Limitation. Code* 1880, § 2678.

A non-resident may acquire title to land by adverse possession held for him by others for ten years. Absence from the state does not prevent the running of the statute in his favor, since ejectment can be brought against the tenant. It is only where a right of action accrues *in this*

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state, and the person liable goes from and resides out of it, that § 2678, code 1880, applies to prevent the period of such absence from being counted. *Lindenmeyer* v. *Gunst*, 693.

AGENT.

See PRINCIPAL AND AGENT.

ALTERATION OF INSTRUMENTS.

1. *Alteration of mortgage. Good faith. Intent to correct mistake.*

The alteration by the mortgagee of the description of land in a mortgage, without the consent of the mortgagor, will not render the mortgage void, if done without any fraudulent intent but only in the honest effort to correct a mistake and conform it to the true intent. *Foote* v. *Hambrick*, 157.

2. *Unauthorized Alteration. Mistake. Description. Homestead.*

Where a husband, having jointly with his wife, executed a mortgage intended to include their homestead, and afterwards, without authority from her, but in an honest effort to correct a mistake, inserted the homestead which had been omitted from the description, the mortgage, though not rendered invalid as to the other lands, is inoperative as to the homestead. As to this, the deed is not her act. *Ib.*

AMENDMENT.

Practice. Claimant's issue. Appeal to circuit court. New affidavit.

The fact that a claimant, through mistake, makes affidavit in the justice court, claiming as trustee in a trust-deed, and, after appeal to the circuit court, files an amended affidavit claiming as agent for the beneficiary, is of no importance, and should not operate to his prejudice. *Mitchell* v. *McDavitt*, 608.

APPEAL.

1. *Multiplicity of suits. Error of jurisdiction. Const.* 1890, § 147.

An appeal from a decree enjoining, for multiplicity, disconnected actions of trespass, brought against the same defendant by different persons injured by the same negligent act, is not governed by § 147, const. 1890, prohibiting a reversal because of error as to whether the cause was of equity or common law jurisdiction, the question being merely as to the power in any court to join such parties in one suit. *Tribette* v. *Railroad Co.*, 182.

2. *Supreme court. Loss of papers by appellee. New trial.*

Where an appeal is perfected, on showing by affidavit that a transcript of the record cannot be had because of the loss or destruction of the

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original papers by appellee's fault, the court will grant a rule on him to show cause why there shall not be a reversal; and, if it appears that the papers have been lost or destroyed, so that the merits cannot be known, the court will reverse, that there may be a new trial. *Quarles* v. *Hiern*, 259.

3. *Supreme court. Penalty less than* $50. *Code* 1880, § 2354.

The jurisdiction of the circuit courts in suits for penalties, where the principal of the demand does not exceed $150, is purely appellate, and if the amount in controversy does not exceed $50, no appeal lies to the supreme court. *Telegraph Co.* v. *Sullivan*, 447.

APPEAL TO CIRCUIT COURT.

1. *Jurisdiction. Waiver. Appeal from justice court. Code* 1880, § 2354.

When, by a town charter, the jurisdiction of a justice for the entire district is attempted to be vested in the mayor, one residing outside the corporate limits, though within the district, who is sued before such officer, does not, by appearing and defending on the merits, waive the right to urge in the circuit court, on appeal, the want of jurisdiction, since § 2354, code 1880, provides for a trial *de novo* on appeal, but requires the circuit court to dismiss causes where the justice had no jurisdiction. *Heggie* v. *Stone*, 39.

2. *Vagrancy. Justice of the peace. Code* 1892, § 1323.

One charged with vagrancy and required by a justice of the peace to give bond for good behavior or be committed to jail, under § 1323, code 1892, may appeal to the circuit court. *Jones* v. *State*, 398.

3. *Assessment. Conclusive effect. Failure to appeal. Code* 1892, §§ 80, 3793.

Tax-payers failing to appeal from an order of the board of supervisors approving an assessment are concluded thereby. *Investment Co.* v. *Suddoth*, 416.

4. *Proceedings against tenant. Recovery of rent. Code* 1880, §§ 1343, 2657.

As § 2657, code 1880, gives a successful plaintiff in unlawful detainer the right, on appeal, to recover rent to the time of trial, and § 1343 provides that, in proceedings before a justice of the peace to recover possession of premises from a tenant in arrears for rent, "the right of appeal shall exist as in cases of unlawful detainer," on appeal to the circuit court, in such proceedings against a tenant, a successful plaintiff may likewise recover rent to the time of trial. *Paxton* v. *Oliver*, 570.

5. *Justice court. Jurisdiction. Trial de novo. Code* 1880, § 2354.

What is a reasonable time to require a defendant to appear in cases of emergency is a question for the decision of the justice. Service of the

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writ gives him jurisdiction of the defendant, and, where he has jurisdiction of the subject, and the defendant appeals, the circuit court cannot dismiss the case on the ground that reasonable notice was not given. In such case, under § 2354, code 1880, the case will be tried anew on its merits in the circuit court. In order to challenge the decision of the justice on questions of law only, the remedy is by *certiorari*. *Goodbar* v. *Owen*, 840.

6. *Appeal. Jurisdiction. Dismissal. Code* 1880, § 2354.

Under § 2354, code 1880, it is only where the justice has no jurisdiction, and not where he makes an erroneous decision within his jurisdiction, that the case is to be dismissed by the circuit court on appeal. *Ib.*

APPEARANCE.

Form of plea. Effect. Judgment.

Where an appellant claims that a plea (which is somewhat ambiguous in form) was intended only as an appearance for a co-defendant, if the plea as filed would have been sufficient to prevent a judgment by default against appellant, it will be treated as an appearance for him, and a judgment for plaintiff based thereon will be sustained. *Solomon* v. *Compress Co.*, 822.

ARGUMENT.

1. *Failure of accused to testify. Comment. Code* 1892, § 1741.

Section 1741, code 1892, declaring that "the failure of the accused, in any case, to testify shall not operate to his prejudice, or be commented on by counsel," is imperative in forbidding any and all comment, friendly or unfriendly, as to such failure; counsel may not even call the attention of the jury to the fact. *Yarbrough* v. *State*, 593.

2. *Same. Admonition. Failure of counsel to heed. New trial.*

Where counsel for the state refers to the failure of the accused to testify, and, being admonished by the court, continues the comment to the extent of stating an alleged reason for it, a new trial will be granted; and this without regard to the character of the comment. *Ib.*

ARREST.

1. *Reward. Fleeing felon. Code* 1880, § 3035.

Where one who has killed another is arrested in open day, on a highway, while going into the town of his residence, being near the business part of it, he declaring at the time that he is on the way to surrender, the arrest is not made while he is "fleeing, or attempting to flee," within the meaning of § 3035, code 1880, and no reward can be allowed therefor. *Oktibbeha County* v. *Cottrell*, 117.

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2. *Arrest without warrant. Fresh pursuit. Code* 1880, § 3026.

Where a burglary is committed at night, and, being discovered the next morning, an officer and others immediately follow, and, shortly coming upon the felon in hiding, he flees, and is followed, this is a fresh pursuit within the meaning of § 3026, code 1880, and a warrant for the arrest is not necessary. *White* v. *State*, 253.

3. *Same. Resisting arrest. Homicide. Self-defense.*

In such case, where the fugitive, being followed, is commanded by one of the pursuers, who is in advance of the officer, to surrender, and he refuses, and, when overtaken, kills such pursuer, who, at the time, presents a pistol, and seeks to arrest him, he is guilty of murder, and cannot invoke the doctrine of self-defense. *Ib.*

4. *Same. Cause of arrest. Showing commission of felony.*

In such case, it is competent for the state to prove that the defendant had committed the burglary the preceding night, as tending to show that the arrest could lawfully be made on pursuit without warrant, and that the defendant knew why he was sought to be arrested. *Ib.*

ASSAULT WITH INTENT TO KILL.

Evidence. Declarations. Res gestæ.

On a trial for assault with intent to murder, it is error to admit, as part of the *res gestæ*, the statement of the prosecuting witness as to who shot him, made in the absence of his supposed assailant, the accused, to persons who reached him a few minutes after he was wounded. *Lloyd* v. *State*, 251.

ASSESSMENT.

1. *Approval of roll. Coahoma county. Laws* 1892, *p.* 362.

At a meeting of the board of supervisors of Coahoma county, in the first district thereof, for the purpose of equalizing assessments, an order was made assuming to change the valuation of certain lands situated in the second district, and the clerk made the changes on the roll as directed. *Held*, that this was unauthorized and void; but, as the board, at its next meeting in the second district, accepted and approved the roll as altered, the approval was good. *Investment Co.* v. *Suddoth*, 416.

2. *Same. Changes noted on roll. Approval. Code* 1892, § 3793.

In equalizing assessments, all changes made by the board of supervisors must be noted on the roll itself, for, when completed, it is the warrant under which the collector acts. It is not necessary for the minutes of the board to show each specific change made. After all corrections are made on the roll, it is to be approved by a general order. *Ib.*

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3. *Conclusive effect. Failure to appeal. Code* 1892, §§ 80, 3793.

Tax-payers failing to appeal from an order of the board of supervisors approving an assessment are concluded thereby. *Ib.*

4. *Mandamus. Property escaping taxation. Code* 1880, §§ 486, 509, 513.

Section 486, code 1880, requires the assessor to assess property that has escaped taxation in former years. Section 509 authorizes him to add property to the roll after returning it to the board of supervisors, and before final action thereon. After that, by § 513, the *collector* is required to assess all property left unassessed. Under these provisions it is the duty of the assessor, at any time, to assess property that has escaped taxation for former years. This he may be compelled to do by mandamus, and it is immaterial that when the suit is brought the time has passed for him to make assessments for the current year. *State* v. *Simmons*, 485.

5. *Assessment for Taxation. Who may make. Legislative power.*

Assessment for taxation can only be made by the officer designated by law; and where the constitution devolves the duty of assessing upon a certain officer, the legislature cannot substitute another. *State* v. *Tonella*, 701.

6. *Assessor. Functions of. Constitutional scheme. Const.* 1890, §§ 112, 138.

The constitution of 1890 (§ 112), in requiring that taxation shall be uniform and equal, and that assessment for taxation shall be under general laws and by uniform rules, according to value, contemplates that such assessment shall be made by the assessor provided for by § 138 thereof, selected for each county and having the well-known functions that have heretofore pertained to that office. *Ib.*

7. *State Revenue Agent. Assessment. Code* 1892, *ch.* 126. *Constitutionality.*

Chapter 126, code 1892, in so far as it provides that the state revenue agent may assess for *ad valorem* taxes property within this state that has escaped taxation, and may collect the taxes thereon, is a departure from the constitutional scheme of securing uniform and equal taxation through assessment by local assessors in each county, and is therefore unconstitutional. *Ib.*

ASSIGNMENT.

1. *Garnishment. Assignment of debt. Notice. Former recovery.*

Where a railroad company, after receiving notice that an employe in this state has assigned his wages, is summoned as garnishee in a suit against such laborer in another state, and, through neglect of the notice, answers admitting the indebtedness, and judgment is rendered against it, the same will be no defense to an action subsequently brought by the assignee of the debt. *Railroad Co.* v. *Bryant*, 665.

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2. *Same. Notice to agent. Scope of agency.*

A railroad company will be bound by a notice of the assignment of wages by an employe served upon a depot-agent where the latter has been accustomed for many years to receive such notices for the company, and, under orders from his superiors, communicate them to the superintendent. *Ib.*

ASSIGNMENT FOR CREDITORS.

1. *Partnership. Preferring debt to former partner.*

Where there is an actual dissolution of a mercantile firm, one of the partners buying the interest of the other, giving a note therefor, and he afterwards fails, and makes an assignment, preferring this debt, creditors cannot defeat the assignment on the ground that there was no notice of the withdrawal, and that, therefore, the retiring partner being personally liable to them, it would be a fraud on their rights to permit the assets thus to be devoted to the claim of the retiring partner. *Richardson* v. *Davis*, 219.

2. *Same. Debt for money loaned former partner.*

This is true also of a debt for money loaned by the retiring member to his former partner after the withdrawal, it being likewise preferred in the assignment. *Ib.*

3. *Same. Dissolution inter sese. Right of former partner.*

That the retiring partner, by failing to give notice, may have become personally liable for the payment of the debts subsequently contracted in the business, does not make him in fact a partner, and in no way affects the validity of the claims due him or the right of the former partner to prefer them in an assignment of the previous firm assets. *Ib.*

4. *Reservation. Good faith. Subsequent fraud.*

If the assignor, in good faith, has embraced in a general assignment made by him all his known estate, it cannot be avoided because it afterwards appears that he owned land not embraced in it, of which he knew nothing at the time he assigned. Nor can the subsequent bad faith of the assignor in reference to such land avoid the assignment. *English* v. *Friedman*, 457.

5. *Same. Subsequent fraud of assignor. Case.*

Accordingly, it is error to instruct that a general assignment for creditors is rendered fraudulent by the subsequent conduct of the assignor in attempting to secure for his sister, as against the assignee, land not mentioned in the assignment, which, at the time he assigned, he did not know he owned. *Ib.*

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6. *Preference. Usurious debt. Validity.*

An assignment for creditors is not rendered invalid by the preference of a creditor whose debt embraces usury, if the amount directed to be paid does not exceed the principal due and legal interest thereon. The assignor may waive his personal privilege under the statute of defeating all interest. *Wetter* v. *Dinkins*, 835.

7. *Same. Preference. Innocent mistake. Interest.*

If in such case the assignor intends to prefer such debt purged of excessive interest, but, through mistake in computing the amount, fails to eliminate all of the excessive interest (the assignee being directed to pay only the amounts justly due all creditors), the assignment will not be rendered invalid. *Ib.*

ASSUMPSIT.

1. *Purchase-money of land. Implied promise. Liability.*

Where, after the death of his wife, a husband sells land of which she died seized, her heirs joining in the conveyance, with the agreement that they are to receive the purchase-money, which, however, he appropriates, he is answerable to them for the same, regardless of any express promise to pay. *Martin* v. *Tillman*, 614.

2. *Same. Tenant by curtesy. Rents. Money had and received.*

In such case, although the husband was then (1876) entitled to possession of the land as tenant by the curtesy, it is error to deduct from the amount due the heirs any thing on account of rents, they having signed the deed upon the promise of their father to pay them the amount received as purchase-money. *Ib.*

3. *Same. Accounting. Money had and received.*

It is likewise error, in such case, to deduct from the amount of purchase-money received for the heirs the value of part of the land embraced in the deed made by them, which part had been previously conveyed away by their father and mother, and as to which it is claimed the heirs had no title. They are entitled to the amount received for them, without regard to the title to such portion of the land. *Ib.*

ATTACHMENT.

1. *Justice of the Peace. Jurisdiction. Code*, 1880, §§ 2191, 2475.

Under §§ 2191, 2475, code 1880, a justice of the peace has jurisdiction to issue the writ and try the cause in an attachment suit against a non-resident, although the only property attached is in another district of the county; and this, too, where there is a qualified and acting justice in such other district. *Griggs* v. *Piano Co.*, 211.

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2. *Non-resident. Debt not due. Plea in abatement.*

Since, to authorize an attachment against a debtor on the ground of non-residence the debt must be due, a plea in abatement that it was not due when suit was begun is sufficient. ***Mack*** v. ***Jacobs***, 429.

3. *Fraud of defendant. Insolvency Relief of plaintiff. Instruction.*

Where, in attachment, the issue is whether defendant had converted, or was about to convert, his property into money with intent to place it beyond the reach of creditors, it is proper to refuse an instruction that if defendant led plaintiff to believe he was insolvent and that he was about to so convert property, the jury should find for plaintiff; unless the question is one of defendant's estoppel to deny the ground of attachment, plaintiff's belief as to defendant's solvency or the truth of the grounds of attachment, is immaterial. *Ib.*

4. *Damages. Act* 1884. *Special verdict. Instruction.*

Under the act of 1884 (Laws, p. 76) the jury, in attachment, may assess punitive damages against the plaintiff, if it certifies in the verdict that it believes that the attachment was sued out "recklessly or wantonly, and without probable cause, or with intent to oppress the defendant." In such case, the plaintiff cannot complain of instructions that impose on defendant the greater burden of showing that the attachment was *maliciously* sued out. *Ib.*

5. *Constitutional Law. Act* 1884. *Verdict. Finality.*

Section 1 of the act of 1884 (Laws, p. 76) is not unconstitutional because it provides that the jury may render a special verdict, and assess punitive damages against the plaintiff in attachment in certain cases, and that "any verdict they may assess shall stand," unless the court shall certify that it is grossly unconscionable, or unwarranted by the facts. The legislature may prescribe the terms on which creditors may resort to the extraordinary remedy by attachment. *Ib.*

6. *Fraudulent assignment. Preferred debt. Evidence.*

On the trial of an attachment, based upon an alleged fraudulent assignment by the defendant, evidence is admissible that prior to the assignment, as a basis for credit, he furnished creditors statements of his indebtedness that omitted a large debt which it was afterwards claimed he then owed his father, and which was preferred in the assignment. So held, although a fraudulent contracting of the debt sued for was not alleged, and although the statements were made months before the assignment. The evidence is admissible on the question of the genuineness of the debt so preferred. ***English*** v. ***Friedman***, 457.

7 *Non-residence. Judgment for defendant. Damages.*

Where an attachment is sued out on the ground that the defendant is a non-resident, and he is such, although judgment for plaintiff is entered

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on the attachment for want of a plea in abatement, yet, if it is adjudicated on the debt issue that plaintiff is not entitled to recover, this is conclusive evidence that the attachment was wrongfully sued out, and defendant has a right of action for damages on the attachment bond. *Buckley* v. *Van Diver*, 622.

8. *Same. Damages. Attorney's fees. Defense of case.*

In such case, as the contest involves the debt, and opposing that successfully defeats the attachment, in a suit on the attachment bond, it is proper to allow as damages attorney's fees for the defense of the original case. *Ib.*

9. *Breach of bond. Actual damages. Attorney's fees.*

Actual damages are recoverable on an attachment bond when a breach occurs, and counsel fees are embraced. *Ib.*

10. *Same. Damages. Protracted litigation. Case.*

In case of an attachment for an alleged debt of $267, where there has been three trials in the circuit court and two appeals, the defendant finally prevailing, in a suit on the bond, damages on account of attorney's fees amounting to $150, paid two attorneys for defending the attachment suit, are not excessive, there being evidence to show that the charge was reasonable and the services necessary. *Ib.*

11. *Chancery Court. Vacating collusive attachments. Remedy at law.*

Creditors may proceed in the chancery court to vacate attachments fraudulently sued out through collusion with the debtor, and to subject the attached property to their demands, and this though, by statute, they have a remedy at law by intervening and contesting the attachments. *Mc Bride* v. *State*, 716.

ATTACHMENT IN CHANCERY.

1. *Construction of statutes. "Person." Municipality not embraced, when.*

Generally, where a statute deals primarily with matters foreign to the ordinary functions of public corporations, and imposes burdens or liabilities on persons without any corresponding benefits, the word "person" will not be held to embrace municipal corporations exercising a part of the state's sovereignty. *Dollman* v. *Moore*, 267.

2. *Same. Attachment. Garnishment. Code* 1880, § 1832. *Case.*

A municipal corporation, or its board of school-trustees, is not a "person" within the meaning of § 1832, code 1880, conferring upon chancery courts jurisdiction of attachment suits against non-resident, absent or absconding debtors and persons in this state, who have in their hands effects of, or are indebted to, such debtors. *Ib.*

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3. *Same. Non-resident. Jurisdiction. Remedy at law.*

Independently of statute, by virtue of its general equity powers, a chancery court may, without a judgment at law and *nulla bona* return, subject to the demands of creditors the effects in this state of a non-resident debtor. *Zecharie* v. *Bowers*, 1 Smed. & M., 584, overruled. *Ib.*

ATTACHMENT FOR RENT.

Statutory remedy. Demand must be for rent.

To entitle a landlord to the statutory remedy of attachment for rent, it is essential that his demand shall be for rent. An agreement of the tenant, as part of the expressed consideration of a lease, to pay as rent a debt which is not such in fact, will not change this. ***Paxton*** v. ***Kennedy***, 865.

ATTORNEY'S FEES.

1. *Attachment. Breach of bond. Actual damages.*

Actual damages are recoverable on an attachment bond when a breach occurs, and counsel fees are embraced. ***Buckley*** v. ***Van Direr***, 622.

2. *Same. Non-resident. Judgment for defendant. Damages.*

Where an attachment is sued out on the ground that the defendant is a non-resident, and he is such, although judgment for plaintiff is entered on the attachment for want of a plea in abatement, yet, if it is adjudicated on the debt issue that plaintiff is not entitled to recover, this is conclusive evidence that the attachment was wrongfully sued out, and, as the contest involves the debt, and opposing that successfully defeats the attachment, in a suit on the attachment bond it is proper to allow as damages attorney's fees for the defense of the original case. *Ib.*

3. *Same. Damages. Protracted litigation. Case.*

In case of an attachment for an alleged debt of $267, where there has been three trials in the circuit court and two appeals, the defendant finally prevailing, in a suit on the bond, damages on account of attorney's fees amounting to $150, paid two attorneys for defending the attachment suit, are not excessive, there being evidence to show that the charge was reasonable and the services necessary. *Ib.*

4. *Partition. When fee taxed. Hostile title. Code* 1892, § 3119.

The power conferred by § 3119, code 1892, on the chancery court in partition suits to tax a reasonable fee for the solicitor of complainant, should be exercised only where the services of such solicitor were for the common benefit of all the parties. It should not be allowed if there is a real controversy between them, and defendants, in good faith, resist the partition; and where defendants assert a hostile title to a part of the

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a fee which includes services in
services in the partition. *Neblett* v.

BAILMENT.

8. Se *Destruction. Negligence. Burden of proof.*

1 [illegible] The law does not presume negligence. When a bailee in an action for non-return of an article borrowed shows that it was destroyed by fire, under circumstances fully disclosed, and not suggestive of any want of proper care, it devolves on the bailor to turn the scale by some evidence inculpatory of the defendant. *Meridian Fair* v. *Railway Co.*, 808.

2. *Property destroyed by fire. Guaranty. Liability.*

An aeronaut contracted with the defendant, a fair association, to give balloon ascensions, and applied to plaintiff to borrow a balloon. Plaintiff knew him to be an experienced aeronaut, but, considering him unreliable financially, refused the loan, whereupon defendant guaranteed the return of the balloon, and plaintiff delivered it, in good condition, to the aeronaut. While in use in filling the engagement, it was destroyed by fire, originating in some inexplicable way. There was no evidence of negligence. *Held*, there was no guaranty as to care or skill in the use of the balloon, or as against accident, but only that it would be returned after use, and plaintiff could not recover. *Ib.*

BANKS.

1. *Privilege tax. Act of* 1888. *Exemption from taxation.*

Under the revenue act of 1888 (Laws, p. 16) a bank that failed to pay a *sufficient* privilege tax, measured by its capital stock and assets, was not entitled to exemption from other taxes—state, county and municipal. *Bank* v. *Oxford*, 504.

2. *Taxation. Code* 1880, § 498. *Repeal. Acts of* 1886 *and* 1888.

Neither the revenue act of 1886 (Laws, p. 12), imposing a privilege tax on banks, nor the revenue act of 1888 (Laws, p. 16), providing that payment of the privilege tax therein imposed should exempt from all other taxes, abrogated § 498, code 1880, which provided for taxing, at its market value, the capital stock of banks. Said section remained in full force, inoperative if the act of 1888 was complied with, but operative if it was not. *Ib.*

3. *Taxation. Payment of insufficient privilege. Code* 1880, § 498.

Accordingly, where a bank failed to pay a sufficient privilege tax under the said act of 1888, its capital stock remained liable to taxation as provided by § 498, code 1880. *Ib.*

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4. *Banking corporation. Taxation of shares. Code* 1880, § 498.

Under § 498, code 1880, and all former codes in this state, the property and assets of banks and other joint-stock companies are not taxable as those of individuals. They are not required to report to the assessor indebtedness due them, money on hand or on deposit, or other assets, but only the value of the shares of capital stock paid in. Thus, through the corporation as a medium, such shares are taxed, and an individual shareholder is not required to give in his shares of stock for separate taxation. *Ib.*

5. *Taxation of capital stock. Non-taxable securities. No deduction therefor.*

Shares of the capital stock in a bank are taxed through the bank, regardless of how the capital is invested. Hence, a bank in reporting its capital stock for taxation must give it in at its market value, and cannot deduct therefrom the amount of its capital or assets invested in non-taxable securities. *Ib.*

6. *Privilege tax. Failure to pay. Relief against. Act of* 1892.

Where a bank did not pay sufficient privilege tax under the act of 1888, its consequent failure to secure exemption from all other taxes cannot be relieved against by availing of the act of 1892 (Laws, p. 31), granting relief on certain terms to those delinquent as to privilege taxes. The latter act relates only to the enforceability of contracts made by such delinquents. *Ib.*

7. *Municipality. Taxation. Valuation of stock. Laws* 1890, *p.* 9.

In taxing banks, under the act of 1890 (Laws, p. 9), municipalities have the right to levy seventy-five per cent. of the state tax on the value of the capital stock paid in, as shown by the statement required to be furnished by the bank to the county assessor. In the absence of a showing that the stock is worth more or less, it is to be rated at par. *Alexander* v. *Thomas*, 517.

8. *Same. Duty of municipal authorities. Assessment.*

If the board of supervisors, in disregard of the statute, assess the capital stock of a bank at less than its value, on the ground that property generally is so assessed, it is the duty of the municipal authorities to disregard this, and assess the stock at its value. *Ib.*

BILL OF REVIEW.

1. *Limitation. Partition. Code* 1880, §§ 2568, 2681, 2693.

Section 2693, code 1880, denying any action to recover property sold under a chancery decree, after two years from date of possession taken by the purchaser, will not debar a minor interested in lands sold in partition proceeding from filing a bill of review at any time within two

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years after coming of age. Code 1880, §§ 2568, 2681. Partition proceedings are governed by an independent chapter of the code, to which the general provision in said § 2693 has no application. *Martin* v. *Gilleylen*, 324.

2. *Limitation. Dismissal. New suit. Code* 1880, §§ 2681, 2686.

Where a bill is filed by a ward, within two years after majority, to review a partition of land in which she was interested, made during minority, and also to surcharge the accounts of her guardian, and at the hearing, because of multifariousness, the bill is dismissed as to the partition without prejudice (relief being given as to the guardian's accounts), this is a dismissal for a "matter of form" within the meaning of § 2686, code 1880, and a new bill to review the partition proceedings may be filed within one year thereafter. *Young* v. *Walker*, 813.

BILLS AND NOTES.

1. *Irregular indorser. Liability. Evidence.*

In an action on a bill of exchange against one who was not payee, and who is not shown to have been holder thereof, or to have had any connection with it except to write his name on the back, the mere introduction of the bill and the protest thereof for non-payment by the acceptor, will not entitle plaintiff to judgment. To fix liability on such defendant, there must be additional evidence showing the capacity in which he indorsed the paper, and notice of dishonor if his liability is secondary. *Holmes* v. *Preston*, 152.

2. *Agency. Manager. Power to bind principal by note.*

An agent, having general authority to manage his principal's mercantile business, has no implied power to bind his principal by making, accepting or indorsing negotiable paper. *Fairly* v. *Nash*, 193.

3. *Same. Execution of note. Principal not bound thereon.*

Although a note executed by a general agent, signed in his name as agent, is for money borrowed to pay debts of the business, transacted by the agent, the principal is not liable in an action *on the note*, whatever may be his liability if sued on the common counts for the money so used. *Ib.*

4. *Bond payable to bearer. Negotiability. How sued on.*

A written obligation reciting that the maker is bound to "Millsaps College, or bearer," in a certain sum, to be paid to said college or its assigns if it shall be permanently located at Jackson, and in consideration of the benefit therefrom, is not governed by § 1124, code 1880, but is negotiable as at common law, and, being payable to bearer, any holder thereof for value, whether by written assignment or not, may sue thereon in his own name. *Hart* v. *Taylor*, 655.

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5. *Contract payable on condition. Recital. Failure of consideration. Estoppel.*

Although a simple contract to pay money on condition is not negotiable, and does not import a consideration, a contract to pay a certain sum to the bearer on a sole condition, which itself implies a consideration, is negotiable, and the maker, when sued by one who has acquired it, for value and in good faith, cannot show a different consideration or failure of consideration. *Ib.*

BOARD OF SUPERVISORS.

Highways. Jurisdiction of supervisors. Right of way. Telegraph line.

The board of supervisors cannot grant to a telegraph company a right of way along the *margin* of a highway. It can confer no right outside the limits of the highway itself. *Clay* v. *Telegraph Co.*, 406.

And see COUNTY.

BONA FIDE PURCHASER.

1. *Consideration. Extending debt. Taking mortgage.*

The abandonment by a creditor of a present right to sue, and the acceptance of a mortgage to secure his debt, payable in the future, constitute him a purchaser for value. *Atkinson* v. *Greaves*, 42.

2. *Payment of consideration. Burden of proof.*

Though the defense of a *bona fide* purchaser is affirmative, and must be pleaded and proved by one who relies upon it, proof of payment of the consideration is *prima facie* evidence of the want of notice, and devolves upon the opposite party the burden of showing notice. *Ib.*

3. *Title. Purchase under trust-deed. Notice.*

When, to secure a creditor, a surviving husband has given a trust-deed conveying the fee of lands, as to which there is a secret resulting trust in favor of his children, the secured creditor being a *bona fide* incumbrancer, and afterwards the husband goes into bankruptcy, and the land is sold by the trustee and assignee in bankruptcy, acting conjointly under a decree of the bankrupt court, a good title passes, though it is recited in the schedules that the bankrupt had only a life-estate. The purchaser acquires title through the trust-deed, regardless of the recitals in the schedules. *Ib.*

4. *Landlord's lien. Purchaser. Notice. Caveat emptor.*

In a suit against one who has purchased and converted agricultural products upon which the plaintiff has a landlord's lien, neither ignorance as

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to the tenancy nor false statement by the tenant as to his right to sell will defeat the landlord's claim. *Warren* v. *Jones*, 202.

5. *Conditional sale. Undivided interest. Reservation of title. Notice.*

Where one, having as partner an undivided interest in personal property, sells the same, reserving title to secure payment of the price, no record is necessary in order to affect with notice purchasers from the vendee. They must beware. *Journey* v. *Priestly*, 584.

6. *Sale. Fraud of buyer. Title. Bona fide purchaser.*

Although a purchaser improperly, or even fraudulently, obtains personal property, not intending to pay for it or to execute his note as agreed with the seller, one who buys the property from him in the usual course of trade, without notice, and before any steps are taken by the original owner to reclaim it, acquires a perfect title. ***Bank*** v. ***Cook Carriage Co.***, 587.

7. *Execution sale. Want of proper notice.*

That at execution sale land is not properly advertised, will not affect the title of a purchaser who has no notice of the irregularity. The fact that the defendant gives a notice at the sale that the *judgment* is void, and that, therefore, the sale will be contested, will not change this. ***Quarles*** v. ***Hiern***, 891.

8. *Same. Purchase by judgment creditor. Notice.*

It is otherwise if the judgment creditor purchases. He is charged with notice of irregularities. *Ib.*

BOND.

Bond for costs. Validity. Absence of affidavit. Code 1880, § 2360.

A bond for costs is valid, although given during the progress of a suit, and without any affidavit, motion and order therefor, as provided by code 1880, § 2360, as the obligors will be deemed to have waived these requirements. Such bond, being one provided for by law, is not voluntary. ***Baggett*** v. ***Watson***, 64.

BOUNDARIES.

1. *Deed; calls of. Boundaries control. Intent of parties.*

When the calls of a deed are for natural or artificial boundaries, these control the courses and distances named, because this effectuates the intention of the parties. *Potts* v. ***Warehouse Co.***, 462.

2. *Same. Streets named as boundaries. Calls of deed.*

Where, north of a street which crosses a railroad, there is a parallel street, extending only to the railroad on one side, and the owner of unplatted

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land on the other side sells a lot, describing it as bounded by the two streets, the parties treating the unopened street as being extended across the railroad, parallel with the other street, there being no doubt as to their intention, the street, when so extended, will be the northern boundary of the lot, although the distance between the streets is only 258 feet, while the deed calls for 300 feet as the length of the lot. *Ib.*

3. *Ejectment. Disputed boundary line. Parol agreement.*

In an action of ejectment growing out of a dispute as to the location of a division line, if the plaintiff shows that the land in controversy is within the calls of his deed, and the defendant relies upon an alleged parol agreement, by which the line was fixed at the place contended for by him, the burden of proof is upon him to show such agreement, and it is proper so to instruct the jury. *Archer* v. *Helm*, 874.

4. *Same. Parol agreement. Permanent location. Instruction.*

In such case, the parol agreement, to be valid, must, in effect, permanently locate the division line, and it is not error so to instruct the jury. *Ib.*

5. *Rents. Mistake as to boundary. Occupancy. Estoppel.*

When defendant in ejectment occupies to a certain line, the plaintiff acquiescing therein under the belief that it is the true boundary, on discovering that he has title to land beyond this line, he is not estopped by such acquiescence from recovering rents of the defendant for his occupancy of the same. *Ib.*

BUILDING AND LOAN ASSOCIATIONS.

1. *Usury. Premium for loans.*

A loan by a building and loan association is not rendered usurious by a premium, which the borrowing member agrees to pay for the loan, since such premium is neither a prepayment of interest nor a deduction of money belonging to the member, but merely represents the agreed discount of the future dividends of his shares of stock. *Sullivan* v. *Building & Loan Association*, 94.

2. *Same. Usury. Interest on premium.*

But, to the extent that the loan contract stipulates for interest on said premium, it is illegal and essentially usurious. So held, where a member bids off a loan of $1,000 at a premium of 40 per cent., receiving in cash $600, but contracts to pay the whole $1,000, with interest thereon at the rate of 8 per cent. per annum. *Ib.*

3. *Same. Act of* 1886. "*Money advanced or loaned.*" *Premium.*

The act of 1886 (Laws, p. 35), excepting building and loan associations from the prohibition against taking more than 10 per cent. interest, does

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not authorize such associations to charge interest on the premiums stipulated to be paid by its members for loans. They are not "money advanced or loaned," within the meaning of said act. *Ib.*

4. *Accounting. Diversion of profits.*

A bill by a borrowing member against a building and loan association, for an accounting, alleged that the premiums and profits of the series to which he belonged, and to which, under the charter, at the time of the contract, he was ratably entitled, by a vote of the stockholders, from which borrowing members were excluded, had been diverted from that series and applied to the equal benefit of other and subsequent series, and that this action deferred the maturity of complainant's stock, causing him loss. *Held*, error to sustain a demurrer to the bill. *Ib.*

BURDEN OF PROOF.

1. *Bona fide purchaser. Payment of consideration.*

Though the defense of a *bona fide* purchaser is affirmative, and must be pleaded and proved by one who relies upon it, proof of payment of the consideration is *prima facie* evidence of the want of notice, and devolves upon the opposite party the burden of showing notice. ***Atkinson*** v. ***Greaves***, 42.

2. *Damages. Matters in aggravation. Violation of law.*

Although acts relied on in aggravation of damages amount to violations of criminal law, the defendant in an action of tort is not entitled to an instruction that he is presumed innocent; nor is the burden on plaintiff to prove them beyond reasonable doubt, but only to establish the substantial matters, by a preponderance of evidence, to the satisfaction of the jury. ***Bonelli*** v. ***Bowen***, 142.

3. *Contract of service. Discharge of employe. Other employment.*

In an action by an employe wrongfully discharged, to recover of his employer, as damages, the balance of the contract-price for the unexpired term of his employment, the burden of proof is on the defendant, if he defends upon the ground that plaintiff had or could have had other employment, and neglected to secure it. ***Odeneal*** v. ***Henry***, 172.

4. *Bailment. Action for non-return. Destruction. Negligence.*

The law does not presume negligence. When a bailee in an action for non-return of an article borrowed shows that it was destroyed by fire, under circumstances fully disclosed, and not suggestive of any want of proper care, it devolves on the bailor to turn the scale by some evidence inculpatory of the defendant. ***Meridian Fair*** v. ***Railway Co.***, 808.

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5. *Affirmative defense. Proof of substantive fact.*

Whenever a defense rests upon a substantive fact, the determination of which adversely to the defendant is not necessary to the establishment by the plaintiff of his case *prima facie*, then the burden of proving that substantive fact is on the defendant. *Archer* v. *Helm*, 874.

6. *Same. Ejectment. Disputed boundary line. Parol agreement.*

In an action of ejectment growing out of a dispute as to the location of a division line, if the plaintiff shows that the land in controversy is within the calls of his deed, and the defendant relies upon an alleged parol agreement, by which the line was fixed at the place contended for by him, the burden of proof is upon him to show such agreement, and it is proper so to instruct the jury. *Ib.*

CARRIERS OF FREIGHT.

See RAILROADS.

CARRIERS OF PASSENGERS.

1. *Railroads. Shipment of live-stock. Transportation of shipper.*

A stipulation in the bill of lading of live-stock that the shipper designated in it may accompany the stock on the freight-train free of charge can be availed of only by him. Another, though assisting the shipper, and claiming an interest in the stock, who, without procuring a ticket or tendering his fare, also boards the train with the shipper, intending to ride free, does not thereby become a passenger. *Railroad Co.* v. *Burnsed*, 437.

2. *Same. Trespasser on train. Injury to. Case.*

And if, soon after boarding the train, a collision is imminent, and, to avoid danger, such person leaps from the train, and is injured, he will not be held to have acquired the rights of a passenger, merely because he had entered the caboose with the shipper, without objection by the conductor, who merely expressed surprise that he also was going, it appearing that the conductor was busily occupied, and, up to the time of the accident, had not demanded his fare, or seen the bill of lading, or learned of such purpose to claim free passage under it. *Ib.*

3. *Same. Injury to trespasser. Liability for.*

In the absence of wantonness or wilfulness on the part of the servants of a railroad company, it is not liable for injury to trespassers, whether in its trains or on its track. *Ib.*

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4. *Railroads. Fast train. Foreign passengers. Custom to stop.*

Though one knows that a certain fast passenger-train, as a rule, does not stop at the station of his residence in this state, yet, if there is a custom for such train to stop there for the accommodation of passengers holding tickets purchased from connecting railways in other states, he may avail himself of this custom by purchasing such a ticket in another state, and making a contract for transportation to said station on said fast train. *Humphries* v. *Railroad Co.*, 453.

5. *Same. Special contract. Breach. Recovery. Peremptory instruction.*

In a suit against the railroad company for failure to stop for plaintiff to get off at said station, he having purchased such a ticket in another state, it is error to instruct for defendant. There being evidence tending to support his contention, it should be left to the jury to say whether plaintiff had a special contract to be carried to said station on that train, and whether there was such custom—a fixed habit, known to the traveling public—to stop for debarkation of foreign travelers. *Ib.*

6. *Same. Sick passenger. Negligence. Damages.*

A declaration against a railroad company which alleges that plaintiff's son, being taken seriously ill while from home, was placed on a train of defendant as a passenger, with a ticket, in charge of the conductor, who, with full knowledge of his condition and of the necessity of his speedily reaching home, promised to take care of him, and to assist him from the train if necessary, but that he wholly neglected this; that the youth, while unconscious, was taken past his destination, and was put off in the night at a place where there were no accommodations, and where he remained without attention for forty hours, being finally sent home, and that, as the result of the neglect and exposure, he shortly afterwards died, states a good cause of action. *Sevier* v. *Railroad Co.*, 61 Miss., 8, distinguished. *Weightman* v. *Railway Co.*, 563.

CHANCERY COURT.

1. *Costs. Execution for. Improper use of process. Vacating sale.*

One at whose instance an execution for costs is issued, having, by agreement with the officers of court, control of the execution, stands, as the officers would, in the attitude of a public trustee, and cannot use the process for oppression or speculation. He must proceed with good faith, and after notice to the debtor if his residence can be ascertained by reasonable diligence. If he disregards this, and buys under the execution property of the debtor without his knowledge, and at a sacrifice, equity will vacate the sale. *Hall* v. *Moore*, 75.

2. *Jurisdiction. Multiplicity. Community of interest. Legal demands.*

The jurisdiction of equity to prevent a multiplicity of suits does not extend to enjoining a number of separate actions at law against the same de-

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fendant to recover damages, where the plaintiffs have no community of interest, except in the question of law and fact involved, and cannot be proceeded against separately in equity. *Tribette* v. *Railroad Co.*, 182.

3. *Same. Injunction. Separate actions of trespass. Case.*

Accordingly, where a number of independent property owners have brought separate actions at law to recover damages of a railroad company for the burning of their property, it cannot enjoin them in equity, on the ground of preventing a multiplicity of suits, although the burning of all resulted from the same alleged negligent act, and all the actions involve the same question of law and fact. *Ib.*

4. *Injunction. Dissolution. Dismissal without prejudice. Effect.*

The dismissal of an injunction suit at the hearing operates as a dissolution of the injunction, and entitles the obligees in the injunction bond to sue for a breach thereof. In such suit the decree of dismissal, though made "without prejudice," is conclusive evidence that the injunction was wrongfully sued out. *Yale* v. *Baum*, 225.

5. *Homestead. Conveyance. Failure of wife to sign. Doing equity.*

Although the wife must join in a conveyance of her husband's homestead, she has no estate therein, and is not a proper party to a bill by him to cancel a trust-deed thereon given by him alone; and he cannot, by joining her as a complainant, avoid the requirement in a court of chancery of doing equity by offering to pay the secured debt. *Massey* v. *Womble*, 69 Miss., 347, distinguished. *Pounds* v. *Clarke*, 263.

6. *Attachment. Non-resident. Jurisdiction. Remedy at law.*

Independently of statute, by virtue of its general equity powers, a chancery court may, without a judgment at law and *nulla bona* return, subject to the demands of creditors the effects in this state of a non-resident debtor. *Zecharie* v. *Bowers*, 1 Smed. & M., 584, overruled. *Dollman* v. *Moore*, 267.

7. *Limitation. Partition. Bill of review. Code* 1880, §§ 2568, 2681, 2693.

Section 2693, code 1880, denying any action to recover property sold under a chancery decree, after two years from date of possession taken by the purchaser, will not debar a minor interested in lands sold in partition proceeding from filing a bill of review at any time within two years after coming of age. Code 1880, §§ 2568, 2681. Partition proceedings are governed by an independent chapter of the code, to which the general provision in said § 2693 has no application. *Martin* v. *Gilleylen*, 324.

8. *Partition. Adverse claim. Jurisdiction. Code* 1880, § 2576.

Under § 2576, code 1880, the chancery court has jurisdiction in a partition suit to adjudicate all conflicting claims or controversies between those properly joined as parties. This is true, even where a defendant,

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alleged to be a co-tenant, denies that he is such, and asserts an adverse title in himself. *Claughton* v. *Claughton*, 384.

9. *Injunction. Jurisdiction. Remedy at law. Supersedeas.*

Where, pending a motion in the circuit court by defendant to set aside a judgment by default, the respective attorneys agree, in writing, that judgment shall stand in favor of plaintiff for a less amount, and execution issues therefor, the defendant, who repudiates the compromise, denying the authority of his counsel to make it, cannot enjoin the execution in equity, for his remedy at law by supersedeas is plain and adequate. *Ricks* v. *Richardson*, 424.

10. *Same. Matters pending in circuit court. No relief in equity.*

And, besides, where the matters in controversy between the parties are actually pending in the circuit court, the chancery court will not take cognizance of them, since so to do might lead to different results in the two courts. *Ib.*

11. *Jurisdiction. Const.* 1890, § 161. *Action of trespass.*

Section 161, constitution 1890, giving the chancery court jurisdiction concurrent with the circuit court "of suits on bonds of public officers for failure to account for money or property received, or wasted or lost by neglect," does not confer on such court jurisdiction of a suit on the bond of a sheriff who has made an excessive levy of attachment on personal property, a part of which is destroyed while in his custody. Although discovery is asked as to the articles destroyed, this is simply an action of damages for trespass, cognizable only at law. *Cazeneuve* v. *Curell*, 521.

12. *Protection of minors. Guardian ad litem. Evidence.*

Although the guardian *ad litem* of minor parties to a suit has filed for them a mere formal answer, it is his duty to object to incompetent testimony that affects adversely their interest. But, regardless of the failure of the guardian *ad litem* to object, the chancery court should, of its own motion, reject such testimony. *Neblett* v. *Neblett*, 572.

13. *Partition. Solicitor's fee. When taxed. Hostile title. Code* 1892, § 3119.

The power conferred by § 3119, code 1892, on the chancery court in partition suits to tax a reasonable fee for the solicitor of complainant should be exercised only where the services of such solicitor were for the common benefit of all the parties. It should not be allowed if there is a real controversy between them, and defendants, in good faith, resist the partition; and where defendants assert a hostile title to a part of the land, it is error, as against them, to tax a fee which includes services in canceling such claim as well as services in the partition. *Ib.*

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14. *Jurisdiction. Partnership interest. Enforcing demand.*

Where the subject of a conditional sale is an undivided interest in a partnership, the seller, in order to enforce payment of the purchase-money, cannot seize the goods by action at law, and may resort to equity. *Journey* v. *Priestly*, 584.

15. *Set-off. Judgment. Assignment.*

Where, pending an action, defendant therein recovers a judgment against plaintiff, the latter, after recovering his judgment, cannot maintain a bill in chancery to compel setting off the two judgments, if, before such recovery by plaintiff, defendant had assigned his judgment. *Holly* v. *Cook*, 590.

16. *Jurisdiction. Injunction. Criminal prosecution.*

Equity has no jurisdiction to enjoin one from making affidavit charging a criminal offense. It is immaterial that the prosecution is alleged to be groundless, and that the defendant has threatened to continue to have the complainant arrested from day to day as a trespasser because of his occupancy of certain premises the possession of which the defendant claims. *Crighton* v. *Dahmer*, 602.

17. *Corporations. Invalid agreement. Part performance. Relief.*

An agreement was made between the directors of two compress companies to merge the two into a new corporation. Pending this, a joint committee took control and managed both properties, dividing the profits. The stockholders of one company refused to ratify this, and it withdrew from the arrangement, and resumed control of its property. Thereupon, the other company filed a bill to enjoin interference with the committee's control, and the injunction was issued, to continue, however, only to the end of the cotton season. The members of the committee were not made parties. The defendant, by cross-bill, prayed for an accounting. On final hearing, complainant, meantime having through the committee and independently of the suit, obtained the desired relief, the bill was dismissed. *Held*, error. The suit should have been retained, not to enforce the invalid agreement, but that an account might be taken as to any benefit received by either party from its partial execution. *Greenville Compress* v. *Planters' Press*, 669.

18. *Jurisdiction. Enforcing statutory penalties. Full relief.*

While courts of equity refuse to enforce penalties growing out of private contracts, they will, in proper cases, enforce statutory penalties, as where, having jurisdiction for one purpose, the enforcement of such penalty is necessary to full relief. *Lafayette* v. *Hall*, 678.

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19. *Treasurer's bond. Reformation. Decree for penalty. Code* 1880, § 375.

Where the chancery court exercises its jurisdiction to reform a general bond of a defaulting county treasurer, and, according to the intent of the parties, decrees that it shall also stand as a bond for school-funds, it should then treat it just as if originally executed as a bond for school-funds, and a decree thereon against the treasurer and his sureties should include the penalty provided for by § 375, code 1880, and be for double the deficit. *Ib.*

20. *Jurisdiction. Fraudulent conveyances. Const.* 1890, § 159. *Code* 1880, § 1843.

Section 159, constitution 1890, by conferring on the chancery court jurisdiction in all cases of which it had jurisdiction when the constitution was put in operation, confirmed in that court the jurisdiction it possessed under § 1843, code 1880, of bills exhibited by creditors without judgment to set aside fraudulent conveyances and other devices to hinder and delay creditors. Such jurisdiction is not affected by § 31 of the said constitution, declaring that the right of trial by jury shall remain inviolate. *McBride* v. *State*, 716.

21. *Same. Vacating collusive attachments. Remedy at law.*

Accordingly, such creditors may proceed in the chancery court to vacate attachments fraudulently sued out through collusion with the debtor, and to subject the attached property to their demands, and this though by statute, they have a remedy at law by intervening and contesting the attachments. *Ib.*

22. *Specific performance. Contract to convey. Limitation. Doing equity.*

Although defendants, whose ancestor contracted to convey land upon payment of the contract price, are barred by lapse of time from recovering either the land or the price from the purchaser, who entered under his contract, the representative of such purchaser, who relies on the bar of the statute of limitations, cannot invoke the aid of equity to cancel defendant's claim to the land, unless he offers to pay the balance of the purchase-money and interest. Such a suit, though in form one to cancel clouds, is one for specific performance, which will not be decreed unless complainant offers to perform his part of the contract. *Nolan* v. *Snodgrass*, 794.

23. *Fraudulent conveyance. Notice to vendee. Collusion. Trust.*

Where an insolvent merchant, through the co-operation of the president of a bank, in falsely representing him to be solvent, was enabled to make unusually large credit purchases of goods, and soon thereafter sold all of his assets to the bank, in consideration of a small sum in cash and a large debt to it, and the president, who acted for the bank, knew that the purpose of the debtor, throughout, was to defraud his other creditors, the sale will be void, and, on a bill filed by such other

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creditors, the bank will be held a trustee for complainants of the property so acquired. *Bank* v. *Oliver*, 868.

24. *Fraudulent vendee. Measure of liability. Creditors' bill.*

In such case, it is error to render a decree against the bank absolutely for the price agreed on for the goods between it and the debtor. It is answerable only for the fair value of the assets so acquired and disposed of by it, and the property still on hand should be sold under the decree. *Ib.*

25. *Same. Bank. Personal liability of agent.*

It is also error in such case to render a decree against the president of the bank personally. His acts are to be deemed the acts of the bank; it, having received the benefit, should alone be charged as trustee. *Ib.*

26. *Illegal execution sale. Relief against.*

If at an execution sale, which is not advertised for the time required, the judgment creditor purchases property at a sacrifice, on timely application, the debtor, if there has been no waiver, may have relief in equity against the sale. *Quarles* v. *Hiern*, 891.

CHANCERY PLEADING.

1. *Bill. Inconsistent averments. Demurrer. Case.*

A bill to foreclose a mortgage, executed by a husband and wife, alleged that, by mistake, the deed embraced land not owned by the grantors, and that the husband altered the mortgage after its delivery by inserting the land intended; and further alleged "that the whole transaction was between the complainant and the husband acting for himself and wife, except that the wife executed the papers after they were prepared." *Held*, on demurrer by the wife, in the absence of any averment of ratification, that this exception, embracing the all-important step of the transaction, negatives the main allegation as to the husband's agency in the whole transaction. *Foote* v. *Hambrick*, 157.

2. *Same. Alternative and inconsistent averments. Case.*

The bill further alleged "that the defendant was either informed by her husband of the mistake, and its correction by him, and acquiesced therein, or she never had any information that any mistake had been made," etc. *Held*, that this alternative averment, which must be taken as true on demurrer, excludes all idea of acquiescence in the alteration, since she could not acquiesce in that of which she had no knowledge. *Ib.*

3. *Affirmative defense. Cross-bill. Subrogation.*

Where the extent of a purchaser's right, if any, is subrogation to the claim of the incumbrancer, on a bill to cancel his claim, the right to subro-

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gation, being affirmative, must be asserted by cross-bill. *Edwards* v. *Hillier*, 803

4. *Code* 1880, § 539. *Bar thereunder. Averments of answer.*

An answer, filed in 1891, averring that defendants acquired a tax-title to the land in controversy in 1878, "and have been in possession for more than three years from the date of said deed," does not sufficiently set up the bar provided by § 539, code 1880, in that it fails to show that defendants have occupied the land for the time required since the code of 1880 (which is prospective) went into effect. *Cochran* v. *Richberger*, 843.

CHANCERY PRACTICE.

Bill. Charges of fraud. Evidence confined to issue. Relief.

Creditors attacked an assignment, averring that certain debts therein preferred were simulated, and were inserted for the purpose of defrauding them. They also alleged generally that the assignment was fraudulent and void. The allegations were denied. The chancellor at the hearing decreeing for defendants, declined to consider any evidence of fraud other than that relating to the genuineness of the preferred debts, although there was no objection to the introduction of testimony. *Held*, proper. *Richardson* v. *Davis*, 219.

CODE 1871.

1. § 1698. Tax-title. Certified list of land sold for taxes. *Cole* v. *Coon*, 634.
2. § 1709. Tax-title. Lapse of three years. Cure of precedent defects. *Pearce* v. *Perkins*, 276; *Cole* v. *Coon*, 634.

CODE 1880.

1. Chapter 39, Sale of liquors. Alcohol not vinous or spirituous liquors. *Lemly* v. *State*, 241.
2. § 375. County treasurer. Embezzlement. Bond. Reformation. Penalty. Equity. *Lafayette County* v. *Hall*, 678.
3. § 486. Assessment of property which escaped taxation in former years. *State* v. *Simmons*, 485.
4. § 498. Assessment of capital stock of corporation. Manufacturing company. *State* v. *Simmons*, 485; *Bank* v. *Oxford*, 504.
5. § 509. Addition to rolls by assessor. *State* v. *Simmons*, 485.
6. § 513. Property left unassessed. Duty of collector to assess and collect. *State* v. *Simmons*, 485.
7. § 539. Tax-title. Three years possession bars suit. *Cochran* v. *Richberger*, 843; *Pearce* v. *Perkins*, 276.
8. § 589. Privilege tax. Failure to pay. Trust-deed. Sale void. Unlawful detainer. *Williams* v. *Simpson*, 113.

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9. § 626. County. Services to pauper not in poor-house. Emergency. *Lee County* v. *Gilbert*, 791.
10. § 979. Partition wall. Parol agreement to build. *Money* v. *Peary*, 260.
11. § 993. Seals abolished. Law not retroactive. Conflict of laws. *Gibbs* v. *McGuire*, 646.
12. § 1047. Railroads. Speed in incorporated towns. Negligence. *Railway Co.* v. *Phillips*, 14; *Home Ins. Co.* v. *Railway Co.*, 119.
13. § 1124. Writings assignable. Off-set. Not applicable to judgments. Bond payable to bearer. *Holly* v. *Cook*, 590; *Hart* v. *Taylor*, 655.
14. § 1178. Husband and wife. Transfers between. Law not retroactive. *Walker* v. *Marseilles*, 283.
15. §§ 1251–52. Allotment of homestead; when binding on debtor. *Richie* v. *Duke*, 66.
16. § 1256. Homestead. Abandonment. Intent to re-occupy. *Moore* v. *Bradford*, 70.
17. § 1258. Homestead. Conveyance. Failure of wife to sign. Growing trees. *McKenzie* v. *Shows*, 388.
18. § 1293. Sale of personalty. Reserving title. Contract recordable. Notice. *Tufts* v. *Stone*, 54.
19. § 1300. Goods acquired in trade. Business sign. Conditional sale. Recorded instruments. *Tufts* v. *Stone*, 54.
20. § 1301. Landlord's lien. Debt of tenant. Guaranty. Supplies. *Ellis* v. *Jones*, 60; *Trimble* v. *Durham*, 295; *Paxton* v. *Kennedy*, 865.
21. § 1343. Tenant holding over. Eviction. Rents to time of trial. *Paxton* v. *Oliver*, 570.
22. § 1433. Errors cured by verdict. Section not applicable to civil cases. *Hambrick* v. *Dent*, 59.
23. § 1551. Set-off. Mutual debts. Demands *ex contractu*. *Wilkinson* v. *Searles*, 392.
24. § 1595. Execution for costs. Witness fees. Abuse of process. *Hall* v. *Moore*, 75.
25. § 1602. Claim against estate. Witness. Deceased partner. Debt due firm. *Jones* v. *Warren*, 227.
26. § 1661. Qualification of jurors. Conflict with constitution 1890. *Nail* v. *State*, 32.
27. § 1744. Judgment. Death of one defendant. Execution. Revivor. *Faison* v. *Johnson*, 214.
28. § 1832. Attachment in chancery. Garnishment. Municipal corporation not a "person." *Dollman* v. *Moore*, 267.
29. § 1843. Chancery jurisdiction. Vacating fraudulent conveyances. Constitution 1890. *McBride* v. *State*, 716.
30. § 2026. Claims against estate. Registration. Debt due firm by deceased partner. *Jones* v. *Warren*, 227.
31. § 2190. Jurisdiction of justice of the peace. Action on penal statute. Appeal. *Telegraph Co.* v. *Sullivan*, 447.
32. § 2191. Jurisdiction of justice. Attachment of non-resident. *Griggs* v. *Piano Co.*, 211.

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33. § 2194. Justice court. Notice to defendant. Trial. Emergency. *Goodbar* v. *Owen*, 840.

34. § 2354. Appeal to circuit court. Trial *de novo*. Dismissal. Appeal to supreme court. Jurisdiction. *Heggie* v. *Stone*, 39; *Goodbar* v. *Owen*, 840; *Telegraph Co.* v. *Sullivan*, 447.

35. § 2360. Security for costs. Affidavit. Waiver. *Baggett* v. *Watson*, 64.

36. § 2443. Garnishment. Void return. Judgment thereon. *Acme Lumber Co.* v. *Vandergrift*, 91.

37. § 2475. Jurisdiction of justice of the peace. Attachment against non-resident. *Griggs* v. *Piano Co.*, 211.

38. § 2568. Partition. Reviewing decree. Limitations. Right of infant. *Martin* v. *Gilleylen*, 324.

39. § 2576. Partition. Adjudication of conflicting claims. *Claughton* v. *Claughton*, 384.

40. § 2580. Partition of personalty. Right of trustee. *Porter* v. *Stone*, 291.

41. § 2645. Unlawful detainer. Remedy. Purchaser under trust-deed. Privilege tax. *Marks* v. *Howard*, 445.

42. § 2678. Limitations. Absence from state. Exception. Not applicable to ejectment. *Lindenmeyer* v. *Gunst*, 693.

43. § 2681. Limitations. Bill of review. Infants. Partition. *Martin* v. *Gilleylen*, 324; *Young* v. *Walker*, 813.

44. § 2686. Limitations. Former action. Matter of form. New suit. *Young* v. *Walker*, 813.

45. § 2693. Limitations. Land sold under decree. Partition proceedings. *Martin* v. *Gilleylen*, 324.

46. § 2949. Sunday law. Telegraph company sending messages. *Telegraph Co.* v. *McLaurin*, 26.

47. § 2985. Carrying concealed weapons. Threatened attack. *Sudduth* v. *State*, 250.

48. § 3026. Arrest without warrant. Fugitive. Fresh pursuit. Homicide. *White* v. *State*, 253.

49. § 3035. Arrest of fugitive. Reward. *Oktibbeha County* v. *Cottrell*, 117.

CODE 1892, ADOPTION OF.

1. *Amending laws. Reference to title. Act* 1892. *Const.* 1890, § 61.

The act of April 2, 1892 (Laws, p. 60), by which the code of 1892 was adopted, was not reviving or amending a law "by reference to its title only" within the prohibition of § 61, constitution 1890, since that has reference only to the ordinary case of reviving or amending in the strict sense of the terms, and not to the adopting of a code or parts of a code. *Hunt* v. *Wright*, 298.

2. *Adoption. Absence of engrossed bills. Const.* 1890, §§ 59, 60.

The adoption of the code of 1892 by the act of April 2, 1892, by reference to duplicate copies of its several chapters, the chapters not being enrolled or engrossed, did not violate §§ 59 and 60 of the constitution of

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1890, which declares how bills shall originate, and that no law shall be passed except by bill. Said act has all the forms and requirements of a bill, and the adoption of the chapters merely by reference and description is not prohibited by the constitution. *Ib.*

CODE 1892, CONSTRUED.

1. Chapter 37. Dram-shops. When chapter took effect. Indictment. Sale. *West* v. *State*, 598.
2. Chapter 126. State revenue agent. Taxes. Power to assess and sue for. *State* v. *Hill*, 106; *State* v. *Tonella*, 701; *McBride* v. *State*, 716.
3. § 4. Construction of code. Former rights not affected. When section took effect. *State* v. *Hill*, 106.
4. § 746. Jeofails. Verdict. Insufficient evidence. Pleading. *Holmes* v. *Preston*, 152.
5. § 1124. Keeping gaming-table. Indictment. Statutory words. *Rawles* v. *State*, 739.
6. § 1323. Vagrancy. Appeal to circuit court. *Jones* v. *State*, 398.
7. § 1423. Impaneling jury. Challenges. Right to full panel. *Gibson* v. *State*, 554.
8. § 1590. Unlawful sale of liquors. Penalties. Action therefor. State revenue agent. *McBride* v. *State*, 716; *State* v. *Fragiacomo*, 799.
9. § 1621. Liquors, sale of. Local option. Election. Judicial notice. *Conrad* v. *State*, 733.
10. § 1740. Witness against estate. Competency. *Neblett* v. *Neblett*, 572.
11. § 1741. Failure of accused to testify. Comment of counsel. *Yarbrough* v. *State*, 593.
12. § 2021. Commissions of tax-collector. Delinquent taxes. *Anderson* v. *Hawks*, 639.
13. §§ 2061–62. Counties. Dividing fences. Stock law. *Leflore County* v. *State*, 769.
14. § 2134. Garnishment. Service of process. Judgment by default. *Scire facias*. *Alexander* v. *Lloyd*, 662.
15. § 2391. Criminal law. Jury. Visiting scene of offense. Absence from court. Constitutionality. *Foster* v. *State*, 755.
16. § 2394. Jurisdiction of justice court. *Telegraph Co.* v. *Sullivan*, 447.
17. § 3035. Municipalities. Acceptance of code chapter. Certification. *Jackson* v. *Shlomberg*, 47; *State* v. *Govan*, 535.
18. § 3119. Partition. Allowance of attorney's fee; when proper. *Neblett* v. *Neblett*, 572.
19. § 3408. Privilege tax. Suit therefor. License to retail liquors not a privilege tax. *State* v. *Fragiacomo*, 799.
20. §§ 3683, 3686. County district office. Justice of peace. Vacancy. Power of governor to fill. *State* v. *Lovell*, 309.
21. § 3793. Objections to assessment-roll. Changes; how made. *Investment Co.* v. *Suddoth*, 416.

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COMPROMISE.

Claim for damages. Release. Fraudulent representations.

Where a railroad company sued by an employe for damages for personal injuries, pleads a release executed by plaintiff, he may avoid the same by showing that it was signed under the belief, induced by the fraudulent representations of the defendant's agents, that it was merely a receipt for wages. *Welsh* v. *Railway Co.*, 20.

CONCEALED WEAPONS.

Threatened attack. Code 1880, § 2985.

One threatened with an attack, may, under § 2985, code 1880, lawfully carry a concealed weapon, although the attack be not threatened to be made at a particular time or on a particular occasion. *Sudduth* v. *State*, 250.

CONFLICT OF LAWS.

1. *Gift in another state. Husband and wife. Creditors.*

A statute of Alabama, under which an unrecorded transfer between husband and wife, though good as between the parties, is void as to creditors and purchasers, cannot have any operation as to transactions made after removal of the parties and property to this state. *Walker* v. *Marseilles*, 283.

2. *Laborer. Exempt wages. Foreign garnishment.*

The exemption under our statutes of a debt due a laborer, who is a citizen of this state, for work done here, cannot be defeated by garnishing the debtor, a railroad company, in another state, it having a line of railroad there, as well as in this state. Both debtor and creditor residing here, the court will give effect to our exemption laws, regardless of the laws of such other state. *Railroad Co.* v. *Smith*, 344.

3. *Title in ejectment. Unsealed deed. Lex rei situs.*

An unsealed deed, executed prior to the code of 1880, abolishing private seals, did not convey the legal title, and cannot now be relied on as evidence of title by a plaintiff in ejectment. That the deed was executed in another state, where seals were not required, makes no difference. The *lex rei situs* controls. *Gibbs* v. *McGuire*, 646.

CONSIDERATION.

Contract; payable on condition. Recital. Estoppel.

Although a simple contract to pay money on condition is not negotiable, and does not import a consideration, a contract to pay a certain sum to

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the bearer on a sole condition, which itself implies a consideration, is negotiable, and the maker, when sued by one who has acquired it, for value and in good faith, cannot show a different consideration or failure of consideration. *Hart* v. *Taylor*, 655.

CONSTITUTION 1869, CONSTRUED.

1. Art. 1, § 21. Appropriation of public moneys. Public schools. Separation of races. *Chrisman* v. *Brookhaven*, 477.
2. Art. 6, § 23. Justice of the peace. How chosen. Territorial jurisdiction of mayor as *ex officio* justice. *Heggie* v. *Stone*, 39.
3. Art. 8, § 1. Uniform system of free public schools. Municipalities. Providing separate schools for races. *Chrisman* v. *Brookhaven*, 477.
4. Art. 12, § 20. Taxation. Equality and uniformity. Local taxation. *Chrisman* v. *Brookhaven*, 477; *State* v. *Simmons*, 485.

CONSTITUTION 1890, CONSTRUED.

1. § 14. Due process of law. Penalties. Legislative power. Summary process. *McBride* v. *State*, 716.
2. § 31. Trial by jury. Chancery jurisdiction. Vacating fraudulent conveyance. Code 1880, § 1843. *McBride* v. *State*, 716.
3. §§ 59, 60. Legislature. How bills shall originate. Adoption of code 1892. *Hunt* v. *Wright*, 298.
4. § 61. Reviving or amending law by reference to title. Not applicable to adoption of code. *Hunt* v. *Wright*, 298.
5. § 68. Revenue and appropriation bills. When passed. Legislative power. *Hunt* v. *Wright*, 298.
6. § 70. Revenue bills. Must receive three-fifths vote. Legislative proceedings. Review by courts. *Hunt* v. *Wright*, 298.
7. § 90. Legislative power. Local laws. Exemptions from public duty. *Chidsey* v. *Scranton*, 449.
8. § 103. Governor. Filling vacancies. County district office. Emergency. *State* v. *Lovell*, 309.
9. § 112. Taxation. Equality and uniformity. State revenue agent. Assessment. *Brennan* v. *Insurance Co.*, 531; *State* v. *Tonella*, 701.
10. § 138. Taxation. Assessor a constitutional officer. State revenue agent. Code 1892, ch. 126; constitutionality. *State* v. *Tonella*, 701.
11. § 147. Supreme court. Error as to jurisdiction. No reversal for. Multiplicity of suits. Injunction. *Tribette* v. *Railroad Co.*, 182; *Cazeneuve* v. *Curell*, 521.
12. § 159. Chancery jurisdiction. Vacating fraudulent conveyances. *McBride* v. *State*, 716.
13. § 161. Chancery jurisdiction. Suits on bonds of public officers. Sheriff. Loss from excessive levy. *Cazeneuve* v. *Curell*, 521.

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14. § 181. Domestic insurance companies. Taxation of. *Brennan* v. *Insurance Co.*, 531.

15. § 193. Railroads. Injury to employe. Fellow-servants. Superior officer. Defective appliances. Departments of labor. *Welsh* v. *Railway Co.*, 20; *Railroad Co.* v. *Cathey*, 332; *Railroad Co.* v. *Hunter*, 471; *Evans* v. *Railway Co.*, 527.

16. § 241. Qualification of voters. Failure to register. Non-payment of taxes. *Nail* v. *State*, 32.

17. § 264. Qualification of jurors. Failure to register as voters. Non-payment of taxes. *Nail* v. *State*, 32.

CONSTITUTIONAL LAW.

1. *Qualification of jurors. Const.* 1890, §§ 241, 264, 274, 276. *Code* 1880, § 1661.

Section 264, constitution 1890, declaring that no person shall be a grand or petit juror unless a qualified elector, and § 241, which provides that no one shall be a qualified elector unless registered, were suspended in their operation—the former by § 274 until April 1, 1892, because of repugnancy to § 1661, code 1880, and the latter by § 276 of the constitution until January 1, 1891; but, since registration under the constitution was left to be provided for by the legislature, which was not to meet until January, 1892, these sections, so far as they required registration as a qualification for voters or jurors, were impliedly and of necessity further suspended until the registration to be provided for by the legislature could be had. *Nail* v. *State*, 32.

2. *Juror not registered. When not ground for challenge.*

Accordingly, after April 1, 1892, but before the registration of voters provided for by the legislature in 1892, it was not a good ground for challenging a juror, otherwise qualified as a voter, that he had not registered under the constitution of 1890. *Ib.*

3. *Qualification of juror. Ineligible as voter. Non-payment of poll-tax.*

But, if it was further objected that such juror had not paid his poll-tax as required by § 241, constitution 1890, and was, therefore, ineligible to registration, the challenge should have been allowed, for, as to this qualification, said section was not impliedly or of necessity suspended to await legislation, and the juror could not have registered if opportunity had been offered. *Ib.*

4. *Challenging juror. Reversible error. Const.* 1890, § 264.

Where defendant's peremptory challenges have been exhausted, refusal by the court to set aside an incompetent juror upon the challenge of the accused is reversible error. Constitution 1890, § 264, declaring that "the want of any such [constitutional] qualification in any juror shall not vitiate any indictment or verdict," does not apply where the judgment

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is assailed because of the court's action in overruling an exception seasonably made to a juror. *Ib.*

5. *Mayor as ex officio justice of the peace. Jurisdiction.*

Under constitution 1869, providing for the election in each county, by districts, of a competent number of justices of the peace, it was not in the power of the legislature to give the mayor of a town the jurisdiction of a justice as to that part of the justice's district outside the town. *Heggie* v. *Stone*, 39.

6. *Legislative power. Creating additional offices.*

The legislature may create offices or agencies not specifically provided for in the constitution, subject to the limitation that there must be no invasion of the plan of the fundamental law and nothing done inconsistent with the unobstructed operation of any of its provisions. *State* v. *Hill*, 106.

7. *Same. State revenue agent; his powers.*

Accordingly, while the constitution provides for various state and county officers, and makes no mention of state revenue agent, it is competent for the legislature to provide for the selection of such officer and to arm him with the power to bring any action which the state or any of its political subdivisions could bring. *Ib.*

8. *Legislative procedure. Power of courts. Review.*

Courts are bound to accept as valid legislative enactments, all such acts as are duly authenticated in the mode prescribed by the constitution, and which do not on their face bear evidence of a disregard of it. They cannot go behind such acts and consult the journals, or otherwise inquire if the legislature complied with the rules of procedure prescribed by the constitution for its observance. *Hunt* v. *Wright*, 298.

9. *Amending laws. Reference to title. Adopting code* 1892. *Const.* 1890, § 61.

The act of April 2, 1892 (Laws, p. 60), by which the code of 1892 was adopted, was not reviving or amending a law "by reference to its title only" within the prohibition of § 61, constitution 1890, since that has reference only to the ordinary case of reviving or amending in the strict sense of the terms, and not to the adopting of a code or parts of a code. *Ib.*

10. *Disregard of constitution. Power of courts. Const.* 1890, §§ 68, 70.

While § 68, constitution 1890, providing that "no revenue or appropriation bill shall be passed during the last five days of the session," and § 70 providing that "no revenue bill shall become a law except by a vote of at least three-fifths of the members present and voting," are obligatory on the legislature, its disregard of them is beyond the reach

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of the courts, which deal with what the legislature does, not with what it should have done or omitted to do in matters of procedure. *Ib.*

11. *Code* 1892. *Adoption. Absence of engrossed bills. Const.* 1890, §§ 59, 60.

The adoption of the code of 1892 by the act of April 2, 1892, by reference to duplicate copies of its several chapters, the chapters not being enrolled or engrossed, did not violate §§ 59 and 60 of the constitution of 1890, which declare how bills shall originate, and that no law shall be passed except by bill. Said act has all the forms and requirements of a bill, and the adoption of the chapters merely by reference and description is not prohibited by the constitution. *Ib.*

12. *Vacancy in office. Justice of the peace. Constitution* 1890, § 103.

The mode of filling vacancies in the office of justice of the peace is, by § 103, constitution 1890, committed entirely to the legislature. *State* v. *Lovell*, 309.

13. *Same. Legislative authority. Code* 1892, §§ 3683, 3686.

The office of justice of the peace is a "county *district* office" under § 3683, code 1892. It is not embraced in § 3686, which authorizes the governor to fill, by appointment, any vacancy in a "county office." Therefore, he is not authorized by it to fill by appointment a vacancy in the office, though the board of supervisors has failed for more than forty days to provide for filling such vacancy by election. But in such case, the local authorities not having filled the vacancy within the time required by law, and the legislature having failed to provide for filling such a vacancy otherwise, a case of emergency arises, authorizing the governor to fill it by provisional appointment, under § 103 of the constitution. *Ib.*

14. *Attachment. Act* 1884. *Verdict. Finality.*

Section 1 of the act of 1884 (Laws, p. 76) is not unconstitutional because it provides that the jury may render a special verdict, and assess punitive damages against the plaintiff in attachment in certain cases, and that "any verdict they may assess shall stand," unless the court shall certify that it is grossly unconscionable, or unwarranted by the facts. The legislature may prescribe the terms on which creditors may resort to the extraordinary remedy by attachment. *Mack* v. *Jacobs*, 429.

15. *Constitution* 1890. *Local law. Repeal. Laws* 1886, *p.* 820.

Section 90, constitution 1890, which directs that certain matters shall only be provided for by general laws, and, among other things, declares that the legislature shall not pass local laws "exempting any person from jury, road or other civil duty (and no person shall be exempted therefrom by force of any local or private law)," does not merely prohibit enacting such laws in future, but repeals existing local laws containing the inhibited exemptions. The act of 1886 (Laws, p. 20), exempting members of Scranton Fire Company from road duty, was repealed thereby. *Chidsey* v. *Scranton*, 449.

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16. *Railroads. Fellow-servant. Const.* 1890, § 193. *Fireman, telegraph operator.*

A fireman on a locomotive and a telegraph operator at one of the company's stations are engaged in different departments of labor, or "about a different piece of work," within the meaning of § 193, constitution 1890, and the railroad company is liable for the injury to or death of the fireman by a collision, resulting from the negligence of the operator. *Railroad Co.* v. *Hunter*, 471.

17. *Same. Const.* 1890, § 193. *Injuries causing death. Who may sue.*

For injuries to an employe resulting in death, an action against a railroad company, based on § 193, constitution 1890, as to fellow-servants, must be brought by "the legal or personal representative"—that is, by the executor or administrator of the decedent. *Ib.*

18. *Municipal bonds. Separate school for whites. Const. U. S.*, 14*th amendment.*

The act of 1890 (Laws, p. 376), authorizing the city of Brookhaven to issue bonds in the sum of $15,000, of which $3,000 is for the use in building and equipping a school for colored children, and $12,000 for a school for white children, is not violative of the fourteenth amendment of the United States constitution. *Chrisman* v. *Brookhaven*, 477.

19. *Constitution* 1869. *Free school-system. Other schools. Taxation.*

Under § 1, art. 8, const. 1869, requiring the legislature to establish "a uniform system of free public schools," while the legislature may not authorize a diversion of the common school-fund, it may empower local authorities to provide schools outside the established system, and to pay therefor by taxation. *Otken* v. *Lamkin*, 56 Miss., 758, distinguished. *Ib.*

20. *Same. Local taxation. Equality and uniformity.*

Local taxation to pay bonds issued for the establishment of such schools is not violative of § 20, art. 12, constitution 1869, requiring taxation to be equal and uniform. *Ib.*

21. *Legislative power. Separate schools for whites. Const.* 1869, § 21, *art.* 1.

A legislative provision for the establishment, by a municipality, of separate schools for whites and blacks, and the issuance of bonds therefor, is not violative of § 21, art. 1, const. 1869 of this state, which provides that "no public money or moneys shall be appropriated for any charitable or other public institution in this state making any distinction among the citizens thereof: *provided*, that nothing herein contained shall be so construed as to prevent the legislature from appropriating the school-fund in accordance with the article in this constitution relating to public schools." *Ib.*

22. *Construction. Constitution. Doubtful provision. Practical interpretation.*

In construing a constitutional provision, the meaning of which cannot be ascertained from the language used, the courts will consider the con-

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temporaneous, practical construction placed on it by the legislature and public, and uniformly acquiesced in. *Ib.*

23. *Chancery jurisdiction. Const.* 1890, § 161. *Action of trespass.*

Section 161, constitution 1890, giving the chancery court jurisdiction concurrent with the circuit court "of suits on bonds of public officers for failure to account for money or property received, or wasted or lost by neglect," does not confer on such court jurisdiction of a suit on the bond of a sheriff who has made an excessive levy of attachment on personal property, a part of which is destroyed while in his custody. Although discovery is asked as to the articles destroyed, this is simply an action of damages for trespass, cognizable only at law. *Cuzeneuve* v. *Curell*, 521.

24. *Same. Const.* 1890, § 147. *Supreme court. Inability to reverse.*

But, under § 147 of the constitution, which forbids the reversal of any judgment or decree on the ground of a want of jurisdiction arising from error as to whether the cause is of equity or common law jurisdiction, if the chancery court, though erroneously, assumes jurisdiction of such action of trespass, the supreme court is powerless to interfere. *Ib.*

25. *Taxation. Domestic insurance company. Const.* 1890, § 181.

Under § 181, constitution 1890, domestic insurance companies are protected against an aggregation of taxes, whether state, county, or municipal, in excess of the tax required of foreign insurance companies doing business in this state, until their assets become sufficient to yield an *ad valorem* tax, which, added to the privilege tax, will exceed the tax required of such foreign companies. *Brennan* v. *Insurance Co.*, 531.

26. *Same. Exemption from taxation. Const.* 1890, § 112.

The provision of § 112, constitution 1890, that no county shall be denied the right to levy county or special taxes upon certain assessments, applies only to assessments of railroad or other like property not situated wholly in one county. With the exception of this provision, there is no limitation in the constitution on the power of the legislature to exempt property from taxation by counties, cities, towns, or villages. *Ib.*

27. *Federal question. United States supreme court. Decisions authoritative.*

This court will consider authoritative the decisions of the supreme court of the United States on a federal question. *Overton* v. *Vicksburg*, 558.

28. *Assessment for taxation. Who may make. Legislative power.*

Assessment for taxation can only be made by the officer designated by law; and where the constitution devolves the duty of assessing upon a certain officer, the legislature cannot substitute another. *State* v. *Tonella*, 701.

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29. *Assessor. Functions of. Constitutional scheme. Const.* 1890, §§ 112, 138.

The constitution of 1890 (§ 112), in requiring that taxation shall be uniform and equal, and that assessment for taxation shall be under general laws and by uniform rules, according to value, contemplates that such assessment shall be made by the assessor provided for by § 138 thereof, selected for each county and having the well-known functions that have heretofore pertained to that office. *Ib.*

30. *State revenue agent. Assessment by. Code* 1892, *ch.* 126. *Constitutionality.*

Chapter 126, code 1892, in so far as it provides that the state revenue agent may assess for *ad valorem* taxes property within this state that has escaped taxation, and may collect the taxes thereon, is a departure from the constitutional scheme of securing uniform and equal taxation through assessment by local assessors in each county, and is therefore unconstitutional. *Ib.*

31. *Chancery jurisdiction. Fraudulent conveyances. Const.* 1890, § 159. *Code* 1880, § 1843.

Section 159, constitution 1890, by conferring on the chancery court jurisdiction in all cases of which it had jurisdiction when the constitution was put in operation, confirmed in that court the jurisdiction it possessed under § 1843, code 1880, of bills exhibited by creditors without judgment to set aside fraudulent conveyances and other devices to hinder and delay creditors. Such jurisdiction is not affected by § 31 of the said constitution, declaring that the right of trial by jury shall remain inviolate. *McBride* v. *State*, 716.

32. *Penalties.* "*Due process of law.*" *Const.* 1890, § 14.

A legislative act providing for the infliction of a penalty and its collection by summary process, without a judicial proceeding adjudicating the liability, is taking private property without due process of law, and is therefore unconstitutional. *Ib.*

33. *Sale of liquors. Penalty. Code* 1892, § 1590, *unconstitutional.*

Section 1590, code 1892, in providing that any person unlawfully selling or giving away liquors shall be liable to the state, town and county, each in the sum of $500, imposes a penalty, not a tax. And so much of the section as provides that the sheriff or state revenue agent can assess and collect such penalties by distress is unconstitutional, being within the prohibition of § 14, constitution 1890, against depriving of property without due process of law. *Ib.*

34. *Trial. Presence of accused. Code* 1892, § 2391. *Constitutionality.*

The constitutional provision that one accused of crime shall be confronted by the witnesses against him, requires that all evidence, whether of living witnesses or inanimate objects, be produced before the jury in the

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presence of the accused and the court. Section 2391, code 1892, to the extent that it authorizes a jury, in a criminal case, to visit the scene of the offense unaccompanied by the accused or the court, is unconstitutional. *Foster* v. *State*, 755.

35. *Counties. Fences between. Legislative control. Stock law.*

It is within legislative control to provide for a joint fence between counties as under the stock law. The benefits are mutual, and it cannot be said that a burden is unwarrantably imposed on the county declining to act. In our arrangement of counties, each must be allowed to act in such matters, and the inconvenience, if any, resulting from contiguity of territory, affords no ground for legal complaint. *Leflore Co.* v. *State*, 769.

36. *Stock law. Electors. Constitutional qualifications; not applicable.*

The provisions of the constitution and the election ordinance as to registration and qualification of electors have no application to elections under the stock law. The legislature has plenary power over the subject. *Ib.*

37. *Exemption from taxation. Vested rights. Const.* 1890, § 181.

Exemption from taxation inuring to the Natchez, Jackson & Columbus Railroad Company under previous legislation, is not affected by § 181, constitution 1890, declaring that the property of all corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, for that section expressly provides that exemptions from taxation then existing should remain in force for the time fixed by charter or the general laws, unless sooner repealed by the legislature. *Railroad Co.* v. *Lambert*, 779.

CONSTRUCTION OF STATUTES.

1. "*Person.*" *Municipality not embraced, when.*

Generally, when a statute deals primarily with matters foreign to the ordinary functions of public corporations, and imposes burdens or liabilities on persons without any corresponding benefits, the word "person" will not be held to embrace municipal corporations exercising a part of the state's sovereignty. *Dollman* v. *Moore*, 267.

2. *Construction. Constitution. Doubtful provision. Practical interpretation.*

In construing a constitutional provision, the meaning of which cannot be ascertained from the language used, the courts will consider the contemporaneous, practical construction placed on it by the legislature and public, and uniformly acquiesced in. *Chrisman* v. *Brookhaven*, 477.

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3. *Exemption from taxation. Charter strictly construed.*

The words of a charter are to be considered rather as those of the incorporators than of the state. Exemptions from taxation must be found in the language employed, construed most favorably to the state. An exemption not clearly given, or existing by necessary inference, cannot be allowed. *State* v. *Simmons*, 485.

4. *Equality of taxation. Restricting words of statute. Construction.*

Unless plainly expressing a different purpose, a statute will be construed as intended to levy a single tax upon property, though the words of the law would naturally bear a broader meaning. The courts will, as far as possible, without doing violence to the language used, restrain the meaning of a statute apparently authorizing double taxation. *Ib.*

5. *Criminal law. Construction of statute. Import of words.*

In construing a criminal statute, it is inadmissible to give to words a meaning they do not contain, in order to accomplish an object it may be supposed the law-maker had in view. *West* v. *State*, 598.

6. *Same. Laws* 1890, *p.* 71. *Selling liquors. Receiving order.*

Accordingly, on the trial of an indictment under § 2 of the act of 1890 (Laws, p. 71), the words "to *sell* any such liquors as are therein prohibited," will not be held to include the mere receipt of an order for liquor to be thereafter sent into the forbidden territory, though it was so sent, and the defendant received pay for the same. *Ib.*

7. *Indictment. Statutory offense. Averments. Words of statute.*

Where the language of a criminal statute is broader than its purpose, and, under certain circumstances, it may be lawful to do the thing forbidden by the words, if taken literally, it is not sufficient to indict in the statutory language. The indictment must charge, in apt language, the facts which make the act unlawful. *Rawles* v. *State*, 739.

CONTRACT.

1. *Evidence of. Written proposal and acceptance. Oral testimony.*

Where plaintiff's letter to defendant proposing to enter his service on certain clearly specified terms, and the defendant's letter in reply accepting the offer, are in evidence and not disputed, it is error to refuse an instruction that these constitute the contract, notwithstanding plaintiff has sworn that the contract was an oral one, made prior to the date of the letters. *Odeneal* v. *Henry*, 172.

2. *Discharge. Reasons for. Knowledge of employer.*

If at the time of the discharge of an employe, sufficient grounds therefor actually existed, the employer is not liable in damages therefor, although

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he did not know of them at the time of the discharge, and may have assigned other reasons. *Ib.*

3. *Deed. Partition wall. Contract to build.*

To recite in a deed, as a part of the consideration, that the vendees, or any subsequent owner of the land conveyed, "shall have the right of uniting with and using the south wall which may be erected by us" thereon, is not to stipulate that a wall shall or *will* be built, and the grantors are not liable in damages for failure to erect one. *Money* v. *Peavy*, 260.

4. *Evidence. Writing. Contemporaneous parol agreement.*

Because of the writing, a contemporaneous parol agreement by such grantor to build the wall cannot be shown. *Ib.*

5. *Partition wall. Verbal agreement to build. Code* 1880, § 979.

Section 979, code 1880, authorizing verbal contracts between those "who own adjoining lots" for erecting partition walls, does not apply to contracts whereby parties are negotiating to become such owners. *Ib.*

6. *Usury. Joint venture. Sharing profits.*

A contract by which complainant is to advance money to publish and introduce defendant's book, and, in consideration thereof, is to be paid his advances, with legal interest, out of the net profits, if any, and also one-half of such profits, imposes no personal liability on defendant, and is not usurious. *Duval* v. *Neal*, 288.

7. *Agency. As to lands. Sale of personalty. Authority.*

A non-resident banker having an agent in this state to look after his wild land here, with power to negotiate sales thereof, subject to approval, pay taxes, sue for trespass, and otherwise exercise general supervision as to the land, is not bound by a contract made by such agent, in his name, to buy 60,000 staves, and sell them to another. So held, although the contract grew out of a transaction in which the agent had, by replevin, seized 23,000 of the staves as having been cut on the land of his principal, and which the principal had authorized him to sell. *Gilchrist* v. *Pearson*, 351.

8. *Performance; manner of. Instruction.*

Where one contracting party is sued in damages for preventing the other from carrying out a contract to do certain work, an instruction for plaintiff is erroneous which, in effect, tells the jury that the defendant, under circumstances named therein, had no right to stop plaintiff if he was prosecuting the work with proper diligence, omitting the qualification that he was doing it in a proper *manner*. *Water Co.* v. *Garman*, 360.

9. *Change of plan. Preventing execution. Damages.*

Where, under a contract, work is to be done in a certain way, and, after difficulties are encountered, by mutual agreement the contractor begins

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anew on a different plan, but is afterwards stopped by the other party, in an action against such party for preventing the execution of the contract, the plaintiff cannot recover, as a part of his damages, the value of the work done by him before the original plan was abandoned. *Ib.*

10. *Preventing execution of contract. Reasons for. Damages.*

Where work under a contract is being properly done, the fact that its further prosecution endangers certain buildings of one of the parties, is no defense to such party in an action of damages by the other party for stopping the work. If the defendant contracted for the work as being done, it can only be stopped subject to liability to the other party for preventing the execution of the contract. *Ib.*

11. *Same. Partial completion. Cost of work increased. Damages.*

In an action by one party to a contract against the other for preventing the contract from being carried out, the wrongful conduct of the defendant increasing the cost of the work contracted for, though not a distinct cause of action under the declaration, may be considered in estimating what, if any thing, plaintiff is entitled to recover for partial completion. *Ib.*

12. *Release of surety. Change of terms. Anticipating payments.*

A stipulation in a building contract that payments shall be in fixed installments, the last when the house is completed, is a security for the execution of the contract, which inures to a surety of the contractor, and, to the extent that the surety is deprived thereof by the owner's act in anticipating payments, he is discharged. *Picard* v. *Shantz*, 381.

13. *Provision in charter not a contract. Taxation of capital stock.*

A provision in the charter of a corporation that the "real and personal property of said company shall be subject to the same taxes, and to be assessed and collected in the same way that the real and personal property of individual citizens is assessed and taxed, and not otherwise," cannot be construed as a contract that the capital stock of the corporation will never be taxed. *State* v. *Simmons*, 485.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CORPORATIONS.

1. *County. Ownership of land. Objection thereto. Sovereignty.*

Where real estate, not necessary for any of the purposes for which the county is authorized to acquire land, is donated to the board of supervisors, the title of the county is not void, but only voidable. Neither

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the grantor nor those claiming under him can question the county's right of ownership and disposition; the state only can object. *Quitman County* v. *Stritze*, 320.

2. *Exemption from taxation. Charter strictly construed.*

The words of a charter are to be considered rather as those of the incorporators than of the state. Exemptions from taxation must be found in the language employed, construed most favorably to the state. An exemption not clearly given, or existing by necessary inference, cannot be allowed. *State* v. *Simmons*, 485.

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4. *Taxation of corporation. Value of capital stock. Code* 1880, § 498.

In assessing a corporation for former years in which it has escaped taxation, under § 498, code 1880, the par value of the capital stock is not controlling. The same is to be assessed "at its market value." Accrued profits, the franchise, real and personal property, and other factors affecting the value of the stock, are to be considered. The assessment being made *nunc pro tunc*, the subject and the burden are to be considered just as they would have been if the assessments had been made at the proper time. *Ib.*

5. *Same. Taxes paid on property. Deduction therefor. Code* 1880, § 498.

The Mississippi Mills, an incorporated company under the laws of this state, is within the terms of § 498, code 1880, which provides for taxing the capital stock of any "bank or other joint-stock company;" and unpaid taxes on its stock for former years are collectible, notwithstanding the fact that it has paid taxes on its real and personal property for such years; but the value of the property so paid on is to be deducted from the valuation of the capital stock. If the value of the property paid on was duly ascertained, it is conclusive. *Ib.*

6. *Property exempted. Valuation of stock reduced. Laws* 1872, *p.* 65; 1882, *p.* 84.

Although it is the capital stock, not the property as such, of the corporation that is taxable, if it was embraced by the act of 1872 (Laws, p. 65), or the act of 1882 (Laws, p. 84), exempting from taxation certain property used in manufactures, effect will be given to said acts by allowing the corporation, in paying back taxes, to deduct the value of the property so exempted from the value of its capital stock *Ib.*

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7. *Taxation of stock. Domestic corporation. Share-holders not taxable.*

Under our statutes a domestic corporation is taxable with the value of its capital stock, and individuals are not taxed on the shares of such stock held by them. *Ib.*

8. *Banks. Taxation of shares. Code* 1880, § 498.

Under § 498, code 1880, and all former codes in this state, the property and assets of banks and other joint-stock companies are not taxable as those of individuals. They are not required to report to the assessor indebtedness due them, money on hand or on deposit, or other assets, but only the value of the shares of capital stock paid in. Thus, through the corporation as a medium, such shares are taxed, and an individual shareholder is not required to give in his shares of stock for separate taxation. *Bank* v. *Oxford*, 504.

9. *Private corporation. May act without seal. Agency. Sale.*

In making a sale of its personal property, a private corporation may act without seal. Agency for the corporation in such case may be proved, and authority to act for it implied, as in case of natural persons. *Carey Lumber Co.* v. *Cain*, 628.

10. *Bill of sale. Authority of manager. Parol evidence.*

It is not essential to the validity of a bill of sale of the personal property of a private corporation that it should be under seal. And parol evidence is admissible to show the authority of an agent or manager to execute such an instrument. *Ib.*

11. *Private corporation. Power of directors. Consolidation.*

In the absence of authority conferred by their charters, an agreement between the directors of corporations to consolidate and merge the two into a new corporation is *ultra vires*. *Greenville Compress* v. *Planters' Press*, 669.

12. *Ultra vires agreement. Part performance. Remedy.*

Although such invalid agreement has been partly performed, no action will lie on the agreement itself, nor can it be specifically enforced, but, to the extent that one of the corporations has received a benefit from its partial execution, the other, by proper proceedings, may recover of it. *Ib.*

13. *Same. Invalid agreement. Part performance. Relief. Case.*

An agreement was made between the directors of two compress companies to merge both into a new corporation. Pending this, a joint committee took control and managed both properties, dividing the profits. The stockholders of one company refused to ratify this, and it withdrew from the arrangement, and resumed control of its property. Thereupon, the other company filed a bill to enjoin interference with the committee's control, and the injunction was issued, to continue, however, only to the

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end of the cotton season. The members of the committee were not made parties. The defendant, by cross-bill, prayed for an accounting. On final hearing, complainant meantime having, through the committee and independently of the suit, obtained the desired relief, the bill was dismissed. *Held*, error. The suit should have been retained, not to enforce the invalid agreement, but that an account might be taken as to any benefit received by either party from its partial execution. *Ib.*

COUNTY.

1. *Pauper. Support outside of poor-house. Duty of supervisors.*

In case of a pauper not in a condition to be removed to the poor-house without cruelty, her condition being made known to the supervisor of the district, who, after long delay, examines into her claims for support, and finds that she is in such condition that she should be cared for where she is, instead of being sent to the poor-house, the board of supervisors should allow to the person who has cared for her proper compensation for her support during the period after notice to the supervisor. *Reynolds* v. *Supervisors*, 59 Miss., 132, distinguished. *Rankin County* v. *Watson*, 85.

2. *Liability for services to pauper. Emergency. Code* 1880, § 626.

Where no steps have been taken to declare one who is indigent and helpless a pauper, and, owing to his physical condition, he cannot be removed to the poor-house, but requires immediate surgical attention, which is bestowed in the emergency, the county is chargeable therefor. *Lee County* v. *Gilbert*, 791.

3. *Statute of limitations. When not available by county. Warrants.*

There is no statute of limitations to bar proceedings to enforce payment of claims against a county which have been allowed by judgment of its authorities. *Ib.*

4. *Ownership of land. Objection thereto. Sovereignty.*

Where real estate, not necessary for any of the purposes for which the county is authorized to acquire land, is donated to the board of supervisors, the title of the county is not void, but only voidable. Neither the grantor nor those claiming under him can question the county's right of ownership and disposition; the state only can object. *Quitman County* v. *Stritze*, 320.

5. *Mandamus. Claims against county. Pleading.*

Mandamus lies to compel a county to pay claims allowed by its authorities; and it is sufficient for petitioner to set out unpaid warrants, averring that they are supported by judgments of allowance. *Taylor* v. *Chickasaw County*, 87.

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COUNTY TREASURER.

Treasurer's bond. Reformation. Decree for penalty. Code 1880, § 375.

Where the chancery court exercises its jurisdiction to reform a general bond of a defaulting county treasurer, and, according to the intent of the parties, decrees that it shall also stand as a bond for school-funds, it should then treat it just as if originally executed as a bond for school-funds, and a decree thereon against the treasurer and his sureties should include the penalty provided for by § 375, code 1880, and be for double the deficit. *Lafayette County* v. *Hall*, 678.

CRIMINAL LAW AND PROCEDURE.

1. Qualification of jurors. Instruction. Circumstantial testimony. Train-wrecking. *Nail* v. *State*, 32.
2. Liquors, sale of. Indictment. Alcohol. *Lemly* v. *State*, 241.
3. Enticing away laborer. Cropper. Indictment. *Ward* v. *State*, 245.
4. Improper conviction. Jury of eleven. Record. *Habeas corpus*. *Scott* v. *State*, 247.
5. Concealed weapons. Threatened attack. *Sudduth* v. *State*, 250.
6. Assault with intent to kill. Declaration of wounded person. *Res gestæ*. *Lloyd* v. *State*, 251.
7. Murder. Resisting arrest. Arrest without warrant. *White* v. *State*, 253.
8. Liquors, sale of. Laws 1886, p. 35. Local option. Malt liquors. Beer. *Boswell* v. *State*, 395.
9. Vagrancy. Appeal to circuit court. *Jones* v. *State*, 398.
10. Murder. Dying declarations. Instruction as to. *Harrison Jones* v. *State*, 401.
11. Violation of road duty. Exemption. Local law. Constitutionality. *Chidsey* v. *Scranton*, 449.
12. Impaneling jury. Challenges. Right to full panel. *Gibson* v. *State*, 554.
13. Municipal ordinance. Vending fresh meats. Constitutionality. *Porter* v. *Water Valley*, 560.
14. Failure of accused to testify. Comment by counsel. *Yarbrough* v. *State*, 593.
15. Grand jury. Improper influences. Indictment. *Wilson* v. *State*, 595.
16. Liquors, sale of. Local option. Sale; what constitutes. Order for liquors. *West* v. *State*, 598.
17. Municipal ordinance. Judicial notice thereof. Sale of liquor. *Naul* v. *McComb City*, 699.
18. Liquors, sale of. Local option. Result of election. Evidence. *Conrad* v. *State*, 733.
19. Keeping gaming-table. Indictment. Use of statutory words. *Rawles* v. *State*, 739.
20. Evidence. Impeaching one's own witness. Surprise. Effect of incompetent evidence. Murder. *Chism* v. *State*, 742.
21. Jury. Visiting scene of homicide. Code 1892, § 2391. Constitutionality. Trial. Presence of accused. *Foster* v. *State*, 755.

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DAMAGES.

1. *Telegraph message. Sunday. Failure to transmit. Code* 1880, § 2949.

A telegraph company accepting for transmission on Sunday, and receiving pay for sending, a message which requests the presence of a lawyer whose services are urgently required in a criminal case, is liable in damages for a failure seasonably to transmit and deliver it. That the transaction is violative of the Sunday law, § 2949, code 1880, is no defense. *Telegraph Co.* v. *McLaurin*, 26.

2. *Same. Recovery by sendee. Attorney's fees.*

In such a case the *sendee* may sue, and is entitled to recover the statutory penalty, and also, as damages, the fee he would have earned had the message been seasonably delivered, the nature and urgency of the message appearing on its face. *Ib.*

3. *Declaration. Matters in aggravation. Averments.*

Where, in an action for damages, the declaration alleged that defendants, in an attempt to collect a debt, forcibly, and against her remonstrance, entered plaintiff's house while she was disrobed, and seized a certain check and demanded of her to indorse it, and took it away, to the damage of plaintiff, etc., the gravamen of the action is the taking of the check, and the other matters are merely in aggravation of damages. *Bonelli* v. *Bowen*, 142.

4. *Mental suffering. Compensation. Punitive damages.*

In such case, mental suffering of the plaintiff is an element of compensatory damages, and it is proper to instruct that the jury may, in estimating damages, consider plaintiff's mental anguish and suffering, if any, and, in addition, may, if deemed proper, award punitive damages. *Ib.*

5. *Preventing execution of contract. Reasons for. Defense.*

Where work under a contract is being properly done, the fact that its further prosecution endangers certain buildings of one of the parties, is no defense to such party in an action of damages by the other party for stopping the work. If the defendant contracted for the work as being done, it can only be stopped subject to liability to the other party for preventing the execution of the contract. *Water Co.* v. *Gorman*, 360.

6. *Same. Partial completion. Cost of work increased.*

In an action by one party to a contract against the other for preventing the contract from being carried out, the wrongful conduct of the defendant increasing the cost of the work contracted for, though not a distinct cause of action under the declaration, may be considered in estimating what, if any thing, plaintiff is entitled to recover for partial completion. *Ib.*

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7. *Attachment. Act* 1884. *Special verdict. Instruction.*

Under the act of 1884 (Laws, p. 76) the jury, in attachment, may assess punitive damages against the plaintiff, if it certifies in the verdict that it believes that the attachment was sued out "recklessly or wantonly, and without probable cause, or with intent to oppress the defendant." In such case, the plaintiff cannot complain of instructions that impose on defendant the greater burden of showing that the attachment was *maliciously* sued out. *Mack* v *Jacobs*, 429.

8. *Same. Non-residence. Judgment for defendant.*

Where an attachment is sued out on the ground that the defendant is a non-resident, and he is such, although judgment for plaintiff is entered on the attachment for want of a plea in abatement, yet, if it is adjudicated on the debt issue that plaintiff is not entitled to recover, this is conclusive evidence that the attachment was wrongfully sued out, and defendant has a right of action for damages on the attachment bond. *Buckley* v. *VanDiver*, 622.

9. *Same. Attorney's fees. Defense of original case.*

In such case, as the contest involves the debt, and opposing that successfully defeats the attachment, in a suit on the attachment bond, it is proper to allow as damages attorney's fees for the defense of the original case. *Ib.*

10. *Same. Breach of bond. Actual damages. Attorney's fees.*

Actual damages are recoverable on an attachment bond when a breach occurs, and counsel fees are embraced. *Ib.*

11. *Same. Protracted litigation. Attorney's fees.*

In case of an attachment for an alleged debt of $267, where there has been three trials in the circuit court and two appeals, the defendant finally prevailing, in a suit on the bond, damages on account of attorney's fees amounting to $150, paid two attorneys for defending the attachment suit, are not excessive, there being evidence to show that the charge was reasonable and the services necessary. *Ib.*

12. *Implied from tort. Instruction.*

In an action of tort, it is error to instruct that if plaintiff has failed to prove any "damages, either actual or possible, the verdict should be for defendant." The law implies damages for every wrong. *Rose* v. *Railway Co.*, 725.

DECREE.

See JUDGMENTS AND DECREES.

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DEED.

1. *Partition wall. Contract to build. Consideration. Action.*

To recite in a deed, as a part of the consideration, that the vendees, or any subsequent owner of the land conveyed, "shall have the right of uniting with and using the south wall which may be erected by us" thereon, is not to stipulate that a wall shall or *will* be built, and the grantors are not liable in damages for failure to erect one. *Money* v. *Peavy*, 260.

2. *Calls of. Boundaries control. Intent of parties.*

When the calls of a deed are for natural or artificial boundaries, these control the courses and distances named, because this effectuates the intention of the parties. *Potts* v. *Warehouse Co.*, 462.

3. *Same. Streets named as boundaries. Control distances.*

Where, north of a street which crosses a railroad, there is a parallel street, extending only to the railroad on one side, and the owner of unplatted land on the other side sells a lot, describing it as bounded by the two streets, the parties treating the unopened street as being extended across the railroad, parallel with the other street, there being no doubt as to their intention, the street, when so extended, will be the northern boundary of the lot, although the distance between the streets is only 258 feet, while the deed calls for 300 feet as the length of the lot. *Ib.*

4. *Recording. Presumption of delivery. Evidence.*

The filing of a deed for record is not necessarily a delivery thereof, yet it raises a presumption of delivery which cannot be overcome by fragmentary and equivocal evidence. *Neblett* v. *Neblett*, 572.

5. *Delivery. Presumption from recitals and registration. Evidence.*

In a suit by the remote devisees of the original owner of land to cancel a conveyance by him to two sons, recorded thirty years before, the deed reciting that the grantor had previously bargained it to them and received the agreed price, the testimony of the widow of one of said grantees that she never heard him claim under the deed, together with evidence that the other grantee, as executor of the will of his mother, through whom complainants claim, had collected and distributed the rents under her will, is, of itself, too inconclusive to warrant the cancellation of the deed. *Ib.*

6. *Seals. Code* 1880, § 993, *abolishing. Not retroactive.*

Section 993, code 1880, abolishing all distinctions between sealed and unsealed instruments, except as to corporations, was not retroactive. It does not affect conveyances executed prior to the adoption of said code, either as to the rights conferred by them or the remedies on them. *Gibbs* v. *McGuire*, 646.

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7. *Title in ejectment. Unsealed deed. Lex rei situs.*

Accordingly, an unsealed deed, executed prior to the code of 1880, did not convey the legal title, and cannot now be relied on as evidence of title by a plaintiff in ejectment. That the deed was executed in another state, where seals were not required, makes no difference. The *lex rei situs* controls. *Ib.*

8. *Mortgage. Validity. Crops to be grown. Potential existence.*

Crops to be grown by the grantor, or his employes, during the year, on land of which he is in possession, either as owner or by the consent of the owner, preparatory to making a crop, have such a potential existence as to be a valid subject of mortgage. *Russell* v. *Stevens*, 685.

DESCRIPTION.

1. *Tax-deed. Uncertainty. Reference to assessment-roll.*

A patent ambiguity in the description of land in a tax-deed made in 1875 cannot be aided by reference to the assessment-roll, if the deed itself contains no such reference. The mention of the reputed owner's name in the deed is not such a reference in aid of the description. *Pearce* v. *Perkins*, 276.

2. *Same. Insufficient description. Case.*

Accordingly, a tax-collector's deed, made in 1875, which describes land thus: "owner's name, C. Dowd, bal. sec. 8, T. 12, R. 17," and the deed from the state as, "bal. sec. 8, T. 12, R. 17," are void for uncertainty of description, and cannot be aided by reference to the assessment-roll. *Ib.*

3. *Description of land. Government survey. Judicial notice.*

In ejectment, identification of the land as "lot 9, section 28, township 9, range 5, Madison county, Mississippi, containing 40.30 acres," is sufficient. The court takes judicial notice that, according to the United States government survey, the range is east in this instance, and it is unnecessary to prove this. *Muse* v. *Richards*, 581.

4. *Trust-deed. Crops. General terms. Ambiguity.*

A trust-deed conveying "the entire crops of corn, cotton and other agricultural products to be raised and gathered by the grantor, his family or employes under him, during the year 1891, on any lands cultivated or controlled by the grantor in Clay county, Mississippi," is sufficiently definite in the description of the property. *Russell* v. *Stevens*, 685.

DISTRESS.

See ATTACHMENT FOR RENT.

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EJECTMENT.

1. *Proof of title. Patent. Certificate from land-office.*

A plaintiff in ejectment who introduces a patent from the state for the *locus in quo*, which is therein referred to as swamp-land, donated to the state by the act of congress of September 28, 1850, together with a certificate from the general land-office, showing that it is included in the list of swamp and overflowed lands inuring to the state under said act, without other proof, makes out a case. *Muse* v. *Richards*, 581.

2. *Evidence. Locus in quo. Identification. Admission.*

In ejectment, where plaintiff's evidence describes the *locus in quo* by section, township and range, but fails to show whether the range is east or west, if the defendant offers to prove that the land in controversy was sold for taxes and purchased by him, this is an admission that the land is the same as embraced in his proffered deed, and obviates the necessity of any further identification. *Ib.*

3. *Description of land. Government survey. Judicial notice.*

In ejectment, identification of the land as "lot 9, section 28, township 9, range 5, Madison county, Mississippi, containing 40.30 acres," is sufficient. The court takes judicial notice that, according to the United States government survey, the range is east in this instance, and it is unnecessary to prove this. *Ib.*

4. *Title in ejectment. Unsealed deed. Lex rei situs.*

An unsealed deed, executed prior to the code of 1880, which abolished private seals, did not convey the legal title, and cannot be relied on as evidence of title by a plaintiff in ejectment. That the deed was executed in another state, where seals were not required, makes no difference. The *lex rei situs* controls. *Gibbs* v. *McGuire*, 646.

5. *Statute of limitations. Demand for rent.*

The statute of limitations of six years applies to a demand for rents asserted by a plaintiff in ejectment. *Lindenmeyer* v. *Gunst*, 693.

6. *Disputed boundary line. Parol agreement.*

In an action of ejectment growing out of a dispute as to the location of a division line, if the plaintiff shows that the land in controversy is within the calls of his deed, and the defendant relies upon an alleged parol agreement, by which the line was fixed at the place contended for by him, the burden of proof is upon him to show such agreement, and it is proper so to instruct the jury. *Archer* v. *Helm*, 874.

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ELECTIONS.

Local option law. Laws 1886, *p.* 35. *Result. Evidence.*

By § 4 of the act of 1886 (Laws, p. 35), it is the duty of the election commissioners to canvass the returns of a local option election and declare the result. Their report is made evidence, and it is the sole evidence of the result, and cannot be questioned in a collateral attack. *Conrad* v. *State*, 733.

EQUITY.

See CHANCERY COURT.

ESTATE OF DECEDENT.

1. *Witness. Code* 1880, § 1602. *Surviving partner as witness.*

On exceptions to the account of an administrator, a surviving partner of the intestate is a competent witness to prove the correctness of an open account in favor of the partnership against the deceased partner, which had been paid by the administrator on an accounting. He is not testifying to establish his own claim against the estate within the meaning of § 1602, code 1880. *Jones* v. *Warren*, 227.

2. *Administration in two states. Accounting. Domicile of assets.*

Where an estate in this state and in Alabama consists in part of decedent's half-interest, as partner in a mercantile firm in this state, and administration is taken out in both states, the balance due to decedent on an accounting of the partnership assets is properly payable to the Mississippi administrator, although deceased lived in Alabama and the accounting was had and money paid in that state. *Ib.*

3. *Same. Administration in this state. What to embrace. Case.*

Where, on such accounting, the administrator, who is administrator in both states, paid the surviving partner of the Mississippi partnership an account due to it by the deceased partner, and then collected and charged to himself, as administrator in this state, the decedent's half of the partnership assets, thus augmented, he should be allowed in his administration in this state for the account so paid; and this, notwithstanding the account was for supplies furnished for decedent's use in Alabama, and the administrator had sought to obtain credit for the amount in his administration in that state. *Ib.*

4. *Estate of partner. Accounting. Limitation. Code* 1880, § 2206.

Said account on the books of the partnership against the deceased partner is not a claim against his estate required to be probated and registered under § 2206, code 1880; nor, before an accounting of the partnership assets, is it subject to the statute of limitations. *Ib.*

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5. *Limitations. Enforcing legacy. Administration. Purchaser.*

Where a legacy is made a charge on the estate of the testator, and certain land of the estate is sold by the heir and devisee, pending administration on the estate and before final settlement, the statute of limitations does not run against the right to enforce the legacy as to the land so held by the purchaser. So held in this case, there being no question involving the right of the purchaser to hold by adverse possession. *Peebles* v. *Acker*, 356.

6. *Set-off. Suit against administrator. Appliction of assets.*

In an action at law against an administratrix on notes executed by the intestate (her husband), where the defendant proves the delivery to plaintiffs of cotton raised by deceased sufficient to pay the notes, plaintiffs cannot meet this by proof that they had an unprobated account against deceased, the amount not stated, and also an account against his widow and children contracted after his death, and that by consent of the widow and children (one of whom was a minor) the cotton had been received in settlement of these accounts, leaving the notes unpaid. *Hyman* v. *Rollins*, 412.

7. *Same. Right of infant distributee. Power of court of law.*

Whatever the right of plaintiffs against the widow and adult distributees, or what would have been the result if plaintiffs had offered to show that they had received the cotton in satisfaction of a valid debt against the *estate*, is not decided. Because of the interest of the infant in the estate, which cannot be protected in such a case in a court of law, the agreement to apply the cotton belonging to it to a debt due by the widow and adult distributees, leaving the notes a charge on the estate, cannot be enforced. *Ib.*

ESTOPPEL.

1. *Infant. Replevin for property sold. Defense.*

Where one, during infancy, sells personal property, receiving part of the price, and on attaining majority brings replevin for the property, and the suit is defended upon a general denial of his right to the property, it will not avail the defendant to show at the trial that there had been no formal renunciation of the contract of sale before suit. *George* v. *Hewlett*, 1.

2. *Same. Placing in statu quo. Practice.*

Nor can the defendant, after such general denial of plaintiff's right, rely upon the defense that he had advanced, for the minor, money to pay certain storage charges on the property, and that plaintiff had failed to pay or tender him the amount before suit. *Ib.*

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3. *Fraudulent conveyance. Good between parties. Statute of frauds.*

Where a debtor, as the principal actor in a scheme to hinder and delay creditors, procures his land to be fraudulently sold under execution, thereby vesting title in his wife, under the statute of frauds, neither he nor his heirs or representatives can question her title thus acquired. *Martin* v. *Tillman*, 614.

4. *Contract payable on condition. Recital. Failure of consideration.*

Although a simple contract to pay money on condition is not negotiable, and does not import a consideration, a contract to pay a certain sum to the bearer on a sole condition, which itself implies a consideration is negotiable, and the maker, when sued by one who has acquired it, for value and in good faith, cannot show a different consideration or failure of consideration. *Hart* v. *Taylor*, 655.

5. *Corporations. Ultra vires agreement. Part performance. Remedy.*

Although an invalid agreement for consolidation of corporations has been partly performed, no action will lie on the agreement itself, nor can it be specifically enforced; but, to the extent that one of the corporations has received a benefit from its partial execution, the other, by proper proceedings, may recover of it. *Greenville Compress* v. *Planters' Press*, 669.

6. *Void sale by trustee. Discharge of incumbrance.*

Where a husband, having conveyed land to a trustee to hold in trust for his wife, afterwards, under alleged authority from the trustee, makes an unauthorized sale thereof, the mere fact that he applied a part of the purchase-money to discharge an incumbrance on the property made by the wife, will not estop her to recover the land. *Edwards* v. *Hillier*, 803.

7. *Conveyance of land Subsequently acquired title of grantor.*

Where one, owning only an undivided interest in land, conveys it by a deed purporting to pass the entire interest, and afterwards acquires the interest of his co-owner, the title thus acquired inures *eo instanti* to his grantee; and it makes no difference that his deed to the purchaser contained a misdescription of the land, this having, meantime, been corrected by decree. *Ib.*

8. *Partition. Infant. Receiving proceeds.*

Where an infant owns an interest in land, a part of which is allotted to her by partition, and this is sold by her guardian, who, after her majority, accounts for and pays over to her the proceeds of sale, she will be estopped from afterwards questioning the legality of the partition proceedings and claiming an interest in the remainder of the land. *Young* v. *Walker*, 813.

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9. *Trustee's sale. Notice. Acquiescence. Presumption.*

Where the grantor is present at a sale made under a trust-deed, and seeks a postponement thereof, and afterwards endeavors to buy the land from the purchaser, and, failing in this, threatens to contest the sale on specific grounds, never alluding to a failure to give the prescribed notice, in a suit to set aside the sale brought several years after possession taken thereunder, independently of any presumption arising from the trustee's deed, it will be assumed that notice of the sale was given as required. *Dunton* v. *Sharpe*, 850.

EVIDENCE.

1. *Impeachment of witness. Certainty. Practice.*

In laying the predicate for the impeachment of a witness, he should be apprised of the time, place and persons present when the supposed conversation took place; and, on the examination of the impeaching witness, he should be confined to the inquiries propounded in the predicate, and should not be asked or permitted to state generally what took place on the occasion inquired about. *Bonelli* v. *Bowen*, 142.

2. *Tort. Matters in aggravation. Violation of law. Burden of proof.*

Although acts relied on in aggravation of damages amount to violations of criminal law, the defendant in an action of damages is not entitled to a presumption of innocence; nor is the burden on plaintiff to prove them beyond reasonable doubt, but only to establish the substantial matters, by a preponderance of evidence, to the satisfaction of the jury. *Ib.*

3. *Contract. Written proposal and acceptance. Oral testimony.*

Where plaintiff's letter to defendant proposing to enter his service on certain clearly specified terms, and the defendant's letter in reply accepting the offer are in evidence and not disputed, it is error to refuse an instruction that these constitute the contract, notwithstanding plaintiff has sworn that the contract was an oral one, made prior to the date of the letters. *Odeneal* v. *Henry*, 172.

4. *Void conviction. Jury of eleven. Record. Parol testimony.*

Where the record of a conviction in the circuit court recites that the accused was tried by a jury, whose names are given, and only eleven names appear, the conviction is void, and parol evidence is inadmissible to show that the trial was by twelve men, and that by a clerical error the name of one was omitted. *Scott* v. *State*, 247.

5. *Assault. Trial. Declarations. Res gestæ.*

On a trial for assault with intent to murder, it is error to admit, as part of the *res gestæ*, the statement of the prosecuting witness as to who

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shot him, made in the absence of his supposed assailant, the accused, to persons who reached him a few minutes after he was wounded. *Lloyd* v. *State*, 251.

6. *Resisting arrest. Homicide. Self-defense.*

Where a fugitive, being followed, is commanded by one of the pursuers, who is in advance of an officer, to surrender, and he refuses, and, when overtaken, kills such pursuer, who, at the time, presents a pistol, and seeks to arrest him, on his trial for the killing it is competent for the state to prove that the defendant had committed a burglary the preceding night, as tending to show that the arrest could lawfully be made on pursuit without warrant, and that the defendant knew why he was sought to be arrested. *White* v. *State*, 253.

7. *Deed. Partition wall. Contract to build. Parol agreement.*

To recite in a deed, as a part of the consideration, that the vendees, or any subsequent owner of the land conveyed, "shall have the right of uniting with and using the south wall which may be erected by us" thereon, is not to stipulate that a wall shall or *will* be built, and the grantors are not liable in damages for failure to erect one. Because of the writing, a contemporaneous parol agreement by such grantor to build the wall cannot be shown. *Money* v. *Peary*, 260.

8. *Tax-deed. Description. Uncertainty. Reference to roll.*

A patent ambiguity in the description of land in a tax-deed made in 1875 cannot be aided by reference to the assessment-roll, if the deed itself contains no such reference. The mention of the reputed owner's name in the deed is not such a reference in aid of the description. *Pearce* v. *Perkins*, 276.

9. *Declarations against interest. Replevin.*

In an action to recover personal property, it is error to exclude testimony for plaintiff that the person, since deceased, under whom defendant claims title, had stated, before defendant's claim arose, that the property was not his, but plaintiff's. *Walker* v. *Marseilles*, 283.

10. *Dying declaration. Credit of. Circumstances.*

On a murder trial it is proper to instruct that the jury may consider all the circumstances under which a dying declaration in evidence was made, and give it such credit as the jury may think it fairly entitled to in the light of all the evidence, as in case of the testimony of a witness. *Harrison Jones* v. *State*, 401.

11. *Trover. Pleading. Description of property.*

While the same particularity of description of the property in trover is not required as formerly, it still is necessary that the *res* for the conversion

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of which the action is brought, should be at least generally described in the declaration and identified by the evidence. *Bank* v. *Montgomery*, 550.

12. *Trover. Insufficient identification of property. Case.*

In such action, where the declaration alleges the conversion of an entire stock of merchandise, consisting of numerous and different kinds of articles, and the evidence shows the conversion of only part of the stock, without designation of the quantity, character or class to which the converted articles belong, plaintiffs are not entitled to a verdict, and an instruction for defendant is proper. *Ib.*

13. *Witness. Competency. Estate of decedent. Code* 1892, § 1740.

Complainants are incompetent witnesses to establish their own claim as devisees of the original owner of lands against persons who claim under a conveyance from such original owner. *Neblett* v. *Neblett*, 572.

14. *Chancery court. Protection of minors. Guardian ad litem.*

Although the guardian *ad litem* of minor parties to a suit has filed for them a mere formal answer, it is his duty to object to incompetent testimony that affects adversely their interest. But, regardless of the failure of the guardian *ad litem* to object, the chancery court should, of its own motion, reject such testimony. *Ib.*

15. *Deed. Recording. Presumption of delivery.*

The filing of a deed for record is not necessarily a delivery thereof, yet it raises a presumption of delivery which cannot be overcome by fragmentary and equivocal evidence. *Ib.*

16. *Same. Delivery. Presumption from recitals and registration.*

In a suit by the remote devisees of the original owner of land to cancel a conveyance by him to two sons, recorded thirty years before, the deed reciting that the grantor had previously bargained it to them and received the agreed price, the testimony of the widow of one of said grantees that she never heard him claim under the deed, together with evidence that the other grantee, as executor of the will of his mother, through whom complainants claim, had collected and distributed the rents under her will, is, of itself, too inconclusive to warrant the cancellation of the deed. *Ib.*

17. *Same. Declarations against interest. Admissibility.*

In such case declarations by one of said grantees, since deceased, as to the non-delivery of the deed, being against interest, are admissible as against defendants claiming under him, but cannot be considered against the representatives of the other grantee, who was not present when the admissions were made. Thus, certain evidence may be competent and controlling as against one class of defendants and incompetent as to others, even where the issue is the same. *Ib.*

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18. *Ejectment. Proof of title. Patent. Certificate from land-office.*

A plaintiff in ejectment who introduces a patent from the state for the *locus in quo*, which is therein referred to as swamp-land, donated to the state by the act of congress of September 28, 1850, together with a certificate from the general land-office, showing that it is included in the list of swamp and overflowed lands inuring to the state under said act, without other proof, makes out a case. *Muse* v. *Richards*, 581.

19. *Same. Locus in quo. Identification. Admission.*

In ejectment, where plaintiff's evidence describes the *locus in quo* by section, township and range, but fails to show whether the range is east or west, if the defendant offers to prove that the land in controversy was sold for taxes and purchased by him, this is an admission that the land is the same as embraced in his proffered deed, and obviates the necessity of any further identification. *Ib.*

20. *Description of land. Government survey. Judicial notice.*

In ejectment, identification of the land as "lot 9, section 28, township 9, range 5, Madison county, Mississippi, containing 40.30 acres," is sufficient. The court takes judicial notice that, according to the United States government survey, the range is east in this instance, and it is unnecessary to prove this. *Ib.*

21. *Argument. Failure of accused to testify. Comment. Code* 1892, § 1741.

Section 1741, code 1892, declaring that "the failure of the accused, in any case, to testify shall not operate to his prejudice, or be commented on by counsel," is imperative in forbidding any and all comment, friendly or unfriendly, as to such failure; counsel may not even call the attention of the jury to the fact. *Yarbrough* v. *State*, 593.

22. *Bill of sale. Corporation. Authority of manager. Parol evidence.*

It is not essential to the validity of a bill of sale of the personal property of a private corporation that it should be under seal. And parol evidence is admissible to show the authority of an agent or manager to execute such an instrument. *Carey Lumber Co.* v. *Cain*, 628.

23. *Trust-deed. Crops. Description. General terms.*

A trust-deed conveying "the entire crops of corn, cotton and other agricultural products to be raised and gathered by the grantor, his family or employes under him, during the year 1891, on any lands cultivated or controlled by the grantor in Clay county, Mississippi," is sufficiently definite in the description of the property. *Russell* v. *Stevens*, 685.

24. *Criminal law. Town ordinance. Judicial notice thereof.*

Courts will not take judicial notice of town ordinances. Hence, in a prosecution for the violation of an alleged ordinance, a conviction will

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not be sustained if the evidence fails to show its existence. *Naul* v. *McComb City*, 699.

25. *Criminal procedure. Sale of liquors. Evidence of distinct sales.*

Where it is alleged that accused unlawfully sold spirituous liquors, it is error to admit evidence of two distinct sales. *Ib.*

26. *Discrediting one's own witness. Adverse testimony. Surprise.*

It is only where the testimony of a witness is *adverse* to the party calling him, and such party shows that he is surprised by his testimony, having had reasonable ground to believe he would testify in his favor, that such party is allowed to discredit the witness by proof of contradictory statements. The rule cannot be invoked if the witness does not testify adversely, but merely denies knowledge of the case. *Chism* v. *State*, 742.

27. *Same. Murder trial. Witness denying knowledge. Former statements.*

Accordingly, where a witness called by the state in a murder trial denies all knowledge of the homicide, the prosecution is not justified in attempting to discredit him by an examination, in which it is shown that he had previously made a different statement, and had testified favorably to the state before the grand jury. *Ib.*

28. *Incompetent evidence. Admission of. Error not cured, when.*

Error in permitting, over objection, such examination, which elicits statements of the witness tending to show his and defendant's responsibility for the murder, and to negative the defense of an *alibi*, set up by the accused, is not cured by immediately afterwards excluding such statements at the suggestion of the state, and instructing the jury not to consider them, unless it can be positively affirmed that the accused was not prejudiced. *Ib.*

29. *Admitting incompetent evidence. Error. New trial.*

When incompetent evidence of great import is deliberately introduced, and it cannot be said with confidence that no other conclusion than that of guilty could have been reached on the legal evidence, the fact that the jury was subsequently instructed to disregard the incompetent testimony, will not cure the error, and for this a new trial will be granted. *Ib.*

30. *Homicide. Medical expert. Common knowledge.*

Where, on a murder trial, the relative position of the accused and the deceased, at the time of the killing, is a material inquiry, a medical expert, who has made a *post mortem* examination, may testify as to the point of entrance and exit, and the course and range of the ball through the body, but it is error to permit him to state his opinion that a hole in an adjacent wall was within the range, or to state his opinion as to the position of the arm and hand of the deceased when shot, these being con-

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clusions resting in common knowledge, and not upon scientific learning. *Foster* v. *State*, 755.

31. *Homicide. Previous difficulty. Threats.*

On a trial for murder, evidence of a previous assault by the deceased on the accused is incompetent, in the absence of evidence that it was connected with or related to the fatal rencounter, or that such previous assault was the result of enmity or threats of violence by deceased against the accused. And wherever the fact of a former difficulty may be proved by the state, the accused should be permitted to show its character. *Ib.*

32. *Facts not tending to prove issue. Irrelevancy.*

In ejectment for a strip of land, where there is a controversy between owners as to the location of a dividing line, defendant claiming that the line had been fixed by agreement, it is not competent to prove that, after this, when a certain survey was made, plaintiff purchased a strip on the other side of his tract equal to what he would lose by locating the controverted line according to such survey. This does not tend to prove the defense relied upon that the line was fixed by plaintiff's agreement. *Archer* v. *Helm*, 874.

33. *Knowledge of defendant. Circumstances admissible.*

Where there is a question as to whether defendant in ejectment cultivated land west of a certain line, and it is proved that he visited the place, it is admissible to show by the testimony of his tenants that they did so cultivate, although they do not say that he knew of their going over the line, and he testifies that he did not know of or authorize it. What knowledge he had is for the jury to say from all the circumstances. *Ib.*

34. *Recalling witness. Rebuttal. Repetition of testimony. Rejection.*

Where a defendant, as a witness, makes a certain denial, and, after plaintiff's testimony (which is contradictory of this) is closed, the defendant is again offered, not to explain or distinguish his denial, but merely to repeat it, there is no error in rejecting his further testimony. *Ib.*

35. *Burden of proof. Affirmative defense. Proof of substantive fact.*

Whenever a defense rests upon a substantive fact, the determination of which adversely to the defendant, is not necessary to the establishment by the plaintiff of his case *prima facie*, then the burden of proving that substantive fact is on the defendant. *Ib.*

36. *Res gestæ. Statements explanatory of conduct.*

Where defendant in ejectment claims that a boundary line in controversy was fixed by parol agreement, and, in order to show that he did not rely on this, evidence is offered to prove that defendant, with others, after the alleged agreement, employed a surveyor to locate this and other lines, it

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is competent for defendant to show, in explanation, that, immediately before the survey, being reluctant to have the same made, he informed a third person, who asked him to join therein, that he did not want the line between plaintiff and himself run, as he regarded it settled. Though occurring beforehand and as an isolated fact, this is admissible as part of the *res gestæ*, and as qualifying the effect of defendant's accession to such employment. *Ib.*

EXECUTION.

1. *Witness fees. Execution therefor. Unsuccessful party. Code* 1880, § 1595.

Section 1595, code 1880, provides that a party recovering costs may file the certificates of his witnesses, the fees of whom he has paid, and have the same included in an execution for costs. This does not apply to the fees of witnesses for an unsuccessful party. They have merely a claim against him, enforceable by suit. *Hall* v. *Moore*, 75.

2. *Costs. Improper use of process. Vacating sale.*

One at whose instance an execution for costs is issued, having, by agreement with the officers of court, control of the execution, stands, as the officers would, in the attitude of a public trustee, and cannot use the process for oppression or speculation. He must proceed with good faith, and after notice to the debtor if his residence can be ascertained by reasonable diligence. If he disregards this, and buys under the execution property of the debtor without his knowledge, and at a sacrifice, equity will vacate the sale. *Ib.*

3. *Death of defendant. Revivor. Code* 1880, § 1744.

Where, before issuance of execution, one of several judgment defendants dies, a sale of his property thereunder, without previous revivor against the heirs, is void. *Faison* v. *Johnson*, 214.

4. *Sale. Want of proper notice. Bona fide purchaser.*

That at execution sale land is not properly advertised, will not affect the title of a purchaser who has no notice of the irregularity. The fact that the defendant gives a notice at the sale that the *judgment* is void, and that, therefore, the sale will be contested, will not change this. *Quarles* v. *Hiern*, 891.

5. *Same. Purchase by judgment creditor. Notice.*

It is otherwise if the judgment creditor purchases. He is charged with notice of irregularities. *Ib.*

6. *Chancery court. Illegal execution sale. Relief against.*

If at an execution sale, which is not advertised for the time required, the judgment creditor purchases property at a sacrifice, on timely applica-

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tion, the debtor, if there has been no waiver, may have relief in equity against the sale. *Ib.*

EXECUTORS AND ADMINISTRATORS.

See ESTATE OF DECEDENT.

EXEMPTION FROM PUBLIC DUTY.

Constitution 1890. *Local law. Repeal. Laws* 1886, *p.* 820.

Section 90, constitution 1890, which directs that certain matters shall only be provided for by general laws, and, among other things, declares that the legislature shall not pass local laws "exempting any person from jury, road or other civil duty (and no person shall be exempted therefrom by force of any local or private law)," does not merely prohibit enacting such laws in future, but repeals existing local laws containing the inhibited exemptions. The act of 1886 (Laws, p. 820), exempting members of Scranton Fire Company from road duty, was repealed thereby. *Chidsey* v. *Scranton*, 449.

EXEMPT PROPERTY.

1. *Homestead. Allotment. New selection. Code* 1880, §§ 1251, 1252.

Where land is levied on under execution, and the judgment debtor has set off to him a part of it as a homestead, the remainder is subject to sale, and he cannot afterwards, and before sale, dispose of the homestead so allotted to him, and move on the other land and claim a homestead therein. *Richie* v. *Duke*, 66.

2. *Same. Abandonment. Intent to re-occupy. Code* 1880, § 1256.

Ceasing to reside on a homestead renders it liable to debts, unless the removal be temporary, by reason of casualty or necessity, and with the purpose of *speedily* re-occupying as soon as the cause is removed. *Moore* v. *Bradford*, 70.

3. *Same. Casualty or necessity. Removal. Intent to re-occupy.*

The intent to re-occupy can have no influence on the question of the existence of the casualty or necessity constituting cause of removal. Both the intent to speedily re-occupy and cause of removal must exist to protect the homestead. If there is no sufficient cause of removal, proof of intent to re-occupy is immaterial. *Ib.*

4. *Same. What is casualty or necessity. Abandonment. Case.*

Where a debtor, in order to get employment, leaves his family in charge of the homestead, going to another county, and shortly afterwards his wife visits him, intending shortly to return to the home, but is taken

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sick and remains with the husband, the place then being rented out and occupied by tenants for several years, the absence is not by reason of "casualty or necessity," and the property, during such absence, becomes liable to sale under execution, though the debtor did not intend to abandon his homestead, and had not changed his citizenship or place of paying poll and street taxes. *Ib.*

5. *Homestead. Conveyance. Failure of wife to sign. Doing equity.*

Although the wife must join in a conveyance of her husband's homestead, she has no estate therein, and is not a proper party to a bill by him to cancel a trust-deed thereon given by him alone; and he cannot, by joining her as a complainant, avoid the requirement in a court of chancery of doing equity by offering to pay the secured debt. *Massey* v. *Womble*, 69 Miss., 347, distinguished. *Pounds* v. *Clarke*, 263.

6. *Same. Alteration of mortgage. Mistake. Description.*

Where a husband, having jointly with his wife, executed a mortgage intended to include their homestead, and afterwards, without authority from her, but in an honest effort to correct a mistake, inserted the homestead which had been omitted from the description, the mortgage, though not rendered invalid as to the other lands, is inoperative as to the homestead. As to this, the deed is not her act. *Foote* v. *Hambrick*, 157.

7. *Same. Husband and wife. Joint property.*

Where a judgment debtor owns jointly with his wife a city lot, he is entitled to a homestead exemption therein of $2,000, to be taken wholly from his half-interest. *Krippendorf* v. *Wolf*, 81.

8. *Exempt wages. Foreign garnishment. Conflict of laws.*

The exemption under our statutes of a debt due a laborer, who is a citizen of this state, for work done here, cannot be defeated by garnishing the debtor, a railroad company, in another state, it having a line of railroad there, as well as in this state. Both debtor and creditor residing here, the court will give effect to our exemption laws, regardless of the laws of such other state. *Railroad Co.* v. *Smith*, 344.

9. *Homestead. Sale of trees. Joinder by wife. Code* 1880, § 1258.

Growing trees are part of the realty. Hence, a conveyance by a husband of all the merchantable timber on his homestead, with an indefinite time for its removal, is an incumbrance of such homestead, and void if the wife does not join. So held where the sale of the timber would reduce by one-half the value of the homestead. *McKenzie* v. *Shows*, 388.

10. *Conveyance of homestead. Failure of wife to join. Effect.*

A conveyance of his homestead by a husband, without his wife's joinder, does not pass an estate in expectancy to vest when the land ceases to be a homestead. It conveys no estate whatever. *Ib.*

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FEDERAL QUESTION.

1. *Interstate commerce. License tax. Citizen of another state.*

A city ordinance imposing a license tax on transient peddlers, so far as it applies to a non-resident traveling agent selling goods by sample for a corporation in another state, though the goods are sent to him for delivery, is void as an attempt to regulate interstate commerce. *Asher* v. *Texas*, 128 U. S., 129, followed. *Overton* v. *Vicksburg*, 558.

2. *United States supreme court. Decisions authoritative, when.*

This court will consider authoritative the decisions of the supreme court of the United States on a federal question. *Ib.*

3. *Removal of causes. Jurisdiction. Waiver.*

A citizen of Tennessee brought two suits in the court below against appellant, the Phœnix Insurance Company, a citizen of Connecticut, one on a policy for $3,000, and the other on a policy for $2,000. At the return-term defendant pleaded to the merits in both cases, and they were continued. Afterwards, during the term, defendant presented a petition and bond in each case to remove the same to the federal court. In each petition it was averred that the "amount involved is $2,000." No action was taken on the petitions, and afterwards defendant filed other pleas. At the next term, on defendant's motion, the cases were consolidated, and defendant, by leave, withdrew its pleas and petitions for removal, and filed a new petition and bond to remove the case, as consolidated, to the federal court. Removal was denied. *Held*, in the absence of an authoritative decision by the supreme court of the United States on the federal question involved, as matter of policy rather than conviction, in view of the history of the case, that the action of the court in refusing the removal would not be disturbed. *Insurance Co.* v. *Summerfield*, 827.

FEES AND COSTS.

1. *Bond for costs. Validity. Absence of affidavit. Code* 1880, § 2360.

A bond for costs is valid, although given during the progress of a suit and without any affidavit, motion and order therefor as provided by code 1880, § 2360, as the obligors will be deemed to have waived these requirements. Such bond, being one provided for by law, is not voluntary. *Baggett* v. *Watson*, 64.

2. *Witness fees. Execution for. Unsuccessful party. Code* 1880, § 1595.

Section 1595, code 1880, provides that a party recovering costs may file the certificates of his witnesses, the fees of whom he has paid, and have the same included in an execution for costs. This does not apply to the fees of witnesses for an unsuccessful party. They have merely a claim against him, enforceable by suit. *Hall* v. *Moore*, 75.

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3. *Costs. Execution for. Improper use of process. Vacating sale.*

One at whose instance an execution for costs is issued, having, by agreement with the officers of court, control of the execution, stands, as the officers would, in the attitude of a public trustee, and cannot use the process for oppression or speculation. He must proceed with good faith, and after notice to the debtor, if his residence can be ascertained by reasonable diligence. If he disregards this, and buys under the execution property of the debtor without his knowledge, and at a sacrifice, equity will vacate the sale. *Ib.*

4. *Tax-collector. Fees of. Delinquent taxes. Code* 1892, § 2021.

Section 2021, code 1892, authorizing tax-collectors to receive "ten per centum on all taxes collected after the fifteenth day of December by distress or otherwise," does not provide a penalty on the delinquent tax-payer, but compensation to the tax-collector for services. The words "or otherwise," following the word distress, must be considered as *ejusdem generis*. Hence the collector is not entitled to such compensation, even after December 15, where the taxes are paid or tendered before a resort by him to distress or some of the other statutory modes for enforcing payment of delinquent taxes. *Anderson* v. *Hawks*, 639.

FELLOW-SERVANT.

See MASTER AND SERVANT.

FENCE.

See STOCK LAWS.

FRAUD.

1. *Claim for damages. Release. Fraudulent representations.*

Where a railroad company sued by an employe for damages for personal injuries, pleads a release executed by plaintiff, he may avoid the same by showing that it was signed under the belief, induced by the fraudulent representations of the defendant's agents, that it was merely a receipt for wages. *Welsh* v. *Railway Co.*, 20.

2. *Attachment. Fraudulent assignment. Evidence.*

On the trial of an attachment, based upon an alleged fraudulent assignment by the defendant, evidence is admissible that prior to the assignment, as a basis for credit, he furnished creditors statements of his indebtedness that omitted a large debt which it was afterwards claimed he then owed his father, and which was preferred in the assignment. So held, although a fraudulent contracting of the debt sued for was not

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alleged, and although the statements were made months before the assignment. The evidence is admissible on the question of the genuineness of the debt so preferred. *English* v. *Friedman*, 457.

3. *Sale. Reservation of title. Agreement to give note.*

Under an agreement by which the purchaser of personal property is to settle promptly, on receipt of bill of lading, by note or draft payable in four months, or in cash within ten days, at an agreed discount, there is no reservation of title in the seller, and, although the terms be not complied with, the title passes by delivery; and although the purchaser improperly, or even fraudulently, obtained such property, not intending to pay for it or to execute his note as agreed, one who buys the property from him in the usual course of trade, without notice and before any steps are taken by the original owner to reclaim it, acquires a perfect title. *Bank* v. *Cook Carriage Co.*, 587.

FRAUDS, STATUTE OF.

1. *Fraudulent conveyance. Good between parties. Statute of frauds.*

Where a debtor, as the principal actor in a scheme to hinder and delay creditors, procures his land to be fraudulently sold under execution, thereby vesting title in his wife, under the statute of frauds, neither he nor his heirs or representatives can question her title thus acquired. *Martin* v. *Tillman*, 614.

FRAUDULENT CONVEYANCE.

1. *Chancery practice. Charges of fraud. Evidence confined to issue.*

Creditors attacked an assignment, averring that certain debts therein preferred were simulated, and were inserted for the purpose of defrauding them. They also alleged generally that the assignment was fraudulent and void. The allegations were denied. The chancellor at the hearing, decreeing for defendants, declined to consider any evidence of fraud other than that relating to the genuineness of the preferred debts, although there was no objection to the introduction of testimony. *Held*, proper. *Richardson* v. *Davis*, 219.

2. *Sale. Fraud. Evidence. Verdict unsupported.*

Where a claimant of personal property seized under execution, introduces in evidence a bill of sale from the debtor, executed prior to the date of the judgment, conveying the property to him in part satisfaction of a trust-deed, and the testimony of the claimant and the debtor in support of the transaction is not unreasonable or improbable, and not contradicted by any positive evidence, a judgment for plaintiff should be set aside as unsupported, although the property was found in defend-

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ant's possession, and there were circumstances that, unexplained, might have cast a suspicion on the good faith of the sale. *Mitchell* v. *McDavitt*, 608.

3. *Conveyance. Good between parties. Statute of frauds.*

Where a debtor, as the principal actor in a scheme to hinder and delay creditors, procures his land to be fraudulently sold under execution, thereby vesting title in his wife, under the statute of frauds, neither he nor his heirs or representatives can question her title thus acquired. *Martin* v. *Tillman*, 614.

4. *Sale. Good faith. Agreement to reconvey. Rights of other creditors.*

Where a sale is made in good faith to pay or secure a creditor, the fact that there is an understanding that the property is to be reconveyed when the debt is paid will not invalidate the sale; nor will the fact that the purchaser knows there are other creditors, and is anxious to close the transaction before they can interfere. So held as against attaching creditors in this case, where an absolute bill of sale was given, which was not recorded, the purchaser, however, taking immediate possession. *Carey Lumber Co.* v. *Cain*, 628.

5. *Chancery jurisdiction. Constitution* 1890, § 159. *Code* 1880, § 1843.

Section 159, constitution 1890, by conferring on the chancery court jurisdiction in all cases of which it had jurisdiction when the constitution was put in operation, confirmed in that court the jurisdiction it possessed under § 1843, code 1880, of bills exhibited by creditors without judgment to set aside fraudulent conveyances and other devices to hinder and delay creditors. Such jurisdiction is not affected by § 31 of the constitution, declaring that the right of trial by jury shall remain inviolate. *McBride* v. *State*, 716.

6. *Same. Vacating collusive attachments. Remedy at law.*

Accordingly, such creditors may proceed in the chancery court to vacate attachments fraudulently sued out through collusion with the debtor, and to subject the attached property to their demands, and this though by statute they have a remedy at law by intervening and contesting the attachments. *Ib.*

7. *Fraud. Notice to vendee. Collusion. Trust.*

Where an insolvent merchant, through the co-operation of the president of a bank, in falsely representing him to be solvent, was enabled to make unusually large credit purchases of goods, and soon thereafter sold all of his assets to the bank in consideration of a small sum in cash and a large debt to it, and the president, who acted for the bank, knew that the purpose of the debtor, throughout, was to defraud his other creditors, the sale will be void, and, on a bill filed by such other

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creditors, the bank will be held a trustee for complainants of the property so acquired. *Bank* v. *Oliver*, 868.

8. *Fraudulent vendee. Measure of liability. Creditors' bill. Decree.*

In such case, it is error to render a decree against the bank absolutely for the price agreed on for the goods between it and the debtor. It is answerable only for the fair value of the assets so acquired and disposed of by it, and the property still on hand should be sold under the decree. *Ib.*

9. *Fraudulent vendee. Personal liability of agent.*

It is also error in such case to render a decree against the president of the bank personally. His acts are to be deemed the acts of the bank; it, having received the benefit, should alone be charged as trustee. *Ib.*

GAMING.

Keeping gaming-table. Averring unlawful act. Code 1892, § 1124.

By § 1124, code 1892, which forbids keeping or exhibiting certain gaming-tables or banks, it was not intended to make criminal the mere act of keeping or exhibiting these. The object was to prevent gambling, and, in an indictment under the statute, the unlawful purpose of keeping a gaming-table or bank must be alleged; the facts must be stated which make the keeping or exhibiting unlawful. *Rawles* v. *State*, 739.

GARNISHMENT.

1. *Attachment. Void return. Judgment thereon. Code* 1880, § 2443.

Where a writ of garnishment omits to require an answer *in writing*, or to require the garnishee to answer whether he was indebted to defendant *at the time of the summoning of the garnishee, or* since that time, or whether he has *since* had effects of defendant, a return by the officer that he had handed to the garnishee "a true notice of the within," is insufficient, since notice of every thing in the writ would not be a compliance with § 2443, code 1880, which entitles the garnishee to notice in writing of the answer he is required to make. A judgment by default on such return will be reversed. *Acme Lumber Co.* v. *Vandergrift*, 91.

2. *Attachment in chancery. Code* 1880, § 1832. *Case.*

A municipal corporation, or its board of school-trustees, is not a "person" within the meaning of § 1832, code 1880, conferring upon chancery courts jurisdiction of attachment suits against non-resident, absent or absconding debtors and persons in this state, who have in their hands effects of, or are indebted to, such debtors. *Dollman* v. *Moore*, 267.

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3. *Attachment in chancery. Non-resident. Jurisdiction. Remedy at law.*

Independently of statute, by virtue of its general equity powers, a chancery court may, without a judgment at law and *nulla bona* return, subject to the demands of creditors the effects in this state of a non-resident debtor. *Zecharie* v. *Bowers*, 1 Smed. & M., 584, overruled. *Ib.*

4. *Municipality. Garnishment of. Decree; who may object.*

Where a municipality, against which, as garnishee, a decree has been rendered in an attachment suit in chancery against a non-resident, fails to object that it is not subject to garnishment, the objection, not being jurisdictional, cannot be made by the defendant in attachment on appeal. *Ib.*

5. *Exempt wages. Foreign attachment. Conflict of laws.*

The exemption under our statutes of a debt due a laborer, who is a citizen of this state, for work done here, cannot be defeated by garnishing the debtor, a railroad company, in another state, it having a line of railroad there, as well as in this state. Both debtor and creditor residing here, the court will give effect to our exemption laws, regardless of the laws of such other state. *Railroad Co.* v. *Smith*, 344.

6. *Writ. Service. Judgment by default. Code* 1892, §§ 2134, 3417.

Section 2134, code 1892, requires writs of garnishment to be served as a summons. Under § 3417, where the service is within five days before the return-day, the garnishee is not required to answer until the next term. In such case, judgment by default cannot be taken against him before the next term, and the fact that five days have elapsed after service, and before entry of the judgment, does not change this. *Alexander* v. *Lloyd*, 662.

7. *Same. Personal service. Scire facias. Code* 1892, § 2134.

The last clause of § 2134, which provides that if a garnishee be not personally served, and make default, judgment *nisi* shall be rendered against him, and a *scire facias* awarded, returnable to the next term, unless the court be satisfied that he can be personally served at once, "in which case it may be returnable instanter," applies only to the service of the *scire facias*, and does not obviate the necessity of serving the original writ five days before the return-term. *Ib.*

8. *Assignment of debt. Notice. Former recovery.*

Where a railroad company, after receiving notice that an employe in this state has assigned his wages, is summoned as garnishee in a suit against such laborer in another state, and, through neglect of the notice, answers admitting the indebtedness, and judgment is rendered against it, the same will be no defense to an action subsequently brought by the assignee of the debt. *Railroad Co.* v. *Bryant*, 665.

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GOVERNOR.

1. *Appointment. Case of emergency. Constitution* 1890, § 103.

Where the local authorities have not filled a vacancy in the office of justice of the peace within the time required by law, and the legislature has failed to provide for filling such a vacancy otherwise, a case of emergency arises, authorizing the governor to fill it by provisional appointment, under § 103 of the constitution. *State* v. *Lovell*, 309.

2. *Duty of executive. Validity of acts. Review by courts.*

Such appointment, pending a controversy in the courts as to the right to the office, is not an invasion by the executive of the judicial department. Charged with the duty of executing the laws and making appointments in proper cases, the governor must decide for himself whether a vacancy exists in a given case, his acts being subject to review by the courts. If he assumes to appoint when there is no vacancy, or when the power to appoint does not exist, it will confer no right. *Ib.*

GRAND JURY.

Attorney before. Improper influence. Indictment.

Where an attorney, who, though not employed to prosecute, goes before the grand jury, and, as a private prosecutor—not a witness—uses his influence in furtherance of a presentment, which is made, the indictment will be held invalid. *Wilson* v. *State*, 595.

GUARANTY.

1. *Letter of. Debts to be created. Notice of acceptance.*

One who writes to another that he will be responsible for advances to be made in reasonable amounts to his tenants, is entitled to notice, within a reasonable time, that the offered guaranty is accepted. If it is not given, he will not be bound thereon. *Ellis* v. *Jones*, 60.

2. *Bailment. Property destroyed by fire. Liability of guarantor.*

An aeronaut contracted with the defendant, a fair association, to give balloon ascensions, and applied to plaintiff to borrow a balloon. Plaintiff knew him to be an experienced aeronaut, but, considering him unreliable financially, refused the loan, whereupon defendant guaranteed the return of the balloon, and plaintiff delivered it, in good condition, to the aeronaut. While in use in filling the engagement, it was destroyed by fire, originating in some inexplicable way. There was no evidence of negligence. *Held*, there was no guaranty as to care or skill in the *use* of the balloon, or as against accident, but only that it would be returned after use, and plaintiff could not recover. *Meridian Fair* v. *Railway Co.*, 808.

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GUARDIAN AND WARD.

1. *Bond. Surety. Release. Past delinquencies. Unauthorized loan.*

As the obligation of a guardian's bond is that the estate of the wards shall be lawfully managed and delivered to them on the termination of the guardianship, a surety thereon, although released by decree of court from further liability, remains liable for loss which results from a prior unauthorized loan of the wards' money. *Bell* v. *Rudolph*, 234.

2. *Same. Surety not discharged. Case.*

Such surety is not discharged by the fact that the guardian, after making the unauthorized loan of money to her insolvent husband, and its use by him in his business, gives a new bond with the husband as co-guardian, and they thereafter, in their accounts, charge themselves with the sum loaned as money on hand. *Ib.*

3. *Same. Decree on accounting. Effect on surety. Payment.*

Nor is such surety released by the decrees of the court approving such subsequent accounts of the guardian. Nothing but payment can discharge the obligation. *Ib.*

4. *Action on bond. Limitation. When time begins to run.*

The duty of the guardian to account to the wards is part of the obligation of his bond. Accordingly, before a final accounting by the guardian, the statute of limitations does not run in favor of a surety as against the wards. *Ib.*

HABEAS CORPUS.

1. *Criminal law. Conviction. Fatal defects of record.*

Although mere irregularities or reversible errors in the proceedings before conviction cannot be availed of by *habeas corpus*, it is otherwise, if it be plainly manifest of record that, because of radical and incurable defects, the verdict and judgment are nullities. *Scott* v. *State*, 247.

2. *Void conviction. Jury of eleven. Record. Parol evidence.*

Where the record of conviction in the circuit court recites that the accused was tried by a jury, whose names are given, and only eleven names appear, the conviction is void, and parol evidence is inadmissible to show that the trial was by twelve men. While the accused is entitled to relief by *habeas corpus* as against such a judgment, he will not be discharged, but will be held for another trial on the same indictment. *Ib.*

HIGHWAYS.

1. *Width. Right of way. Telegraph companies.*

Public roads are required to be opened and worked to a width of at least ten and not more than thirty feet. A telegraph company, given the

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right of way for its line along such a road, is not justified in assuming that there is a uniform legal width of thirty feet, and that it has the right to cut trees anywhere within fifteen feet of the center. It must be governed by the actual width of the road. *Clay* v. *Telegraph Co.*, 406.

2. *Jurisdiction of supervisors. Right of way. Telegraph line.*

Boards of supervisors cannot grant to a telegraph company a right of way along the *margin* of a highway. It can confer no right outside the limits of the highway itself. *Ib.*

HOMICIDE.

1. *Arrest without warrant. Fresh pursuit. Code* 1880, § 3026. *Self-defense.*

Where a burglary is committed at night, and, being discovered the next morning, an officer and others immediately follow, and, shortly coming upon the felon in hiding, he flees, and is followed, this is a fresh pursuit within the meaning of § 3026, code 1880, and a warrant for the arrest is not necessary; and where the fugitive, being followed, is commanded by one of the pursuers, who is in advance of the officer, to surrender, and he refuses, and, when overtaken, kills such pursuer, who, at the time, presents a pistol, and seeks to arrest him, he is guilty of murder, and cannot invoke the doctrine of self-defense. *White* v. *State*, 253.

2. *Evidence. Dying declaration. Credit of. Circumstances.*

On a murder trial it is proper to instruct that the jury may consider all the circumstances under which a dying declaration in evidence was made, and give it such credit as the jury may think it fairly entitled to in the light of all the evidence, as in case of the testimony of a witness. *Harrison Jones* v. *State*, 401.

3. *Instruction. Conviction of manslaughter.*

One tried for murder, but convicted of manslaughter only, cannot complain of a charge, warranted by the evidence, instructing the jury as to a conviction for murder. *Ib.*

4. *Same. Murder. Joint design to kill.*

On the trial of two persons for murder, an instruction that if they, or either of them, shot and killed deceased, and that before, or at the time, the shots were fired defendants had formed in their minds a premeditated design to kill deceased, and that the shots were fired in furtherance of such design, without legal excuse, they should be convicted of murder, though subject to criticism, by fair construction means the same as if the language had been "if defendants, *together or jointly*, had formed the design." *Brabston* v. *State*, 68 Miss., 208, distinguished. *Ib.*

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5. *Incompetent evidence. Admission of. Error not cured.*

Error in permitting, over objection, an examination, which elicits statements of a witness tending to show his and defendant's responsibility for a murder, and to negative the defense of an *alibi*, set up by the accused, is not cured by immediately afterwards excluding such statements at the suggestion of the state, and instructing the jury not to consider them, unless it can be positively affirmed that the accused was not prejudiced. *Chism* v. *State*, 742.

6. *Jury; visiting scene of homicide. Presence of accused. Case.*

Where a homicide occurred in a railway-coach, and, pending the trial for murder, the jury visit the scene, accompanied by the accused, but the latter is prevented by the officer from entering the coach with the jury, this is a denial of his constitutional right to be present when evidence is introduced, notwithstanding the jury remains in the coach only two or three minutes, and it is only for a part of this time that the accused is excluded. *Foster* v. *State*, 755.

7. *Trial. Evidence of previous difficulty. Threats.*

On a trial for murder, evidence of a previous assault by the deceased on the accused is incompetent, in the absence of evidence that it was connected with or related to the fatal rencounter, or that such previous assault was the result of enmity or threats of violence by deceased against the accused. And wherever the fact of a former difficulty may be proved by the state, the accused should be permitted to show its character. *Ib.*

HUSBAND AND WIFE.

1. *Purchase in joint name. Presumption of gift.*

Where a husband buys land, taking the title in his wife's name and his own jointly, and afterwards makes improvements thereon, the presumption is of a gift to her of a half-interest in both the land and improvements. *Krippendorf* v. *Wolf*, 81.

2. *Homestead. Husband and wife. Joint property.*

Where a judgment debtor owns jointly with his wife a city lot, he is entitled to a homestead exemption therein of $2,000, to be taken wholly from his half-interest. *Ib.*

3. *Same. Alteration of mortgage. Mistake. Description.*

Where a hubsand, having, jointly with his wife, executed a mortgage intended to include their homestead, and, afterwards, without authority from her, but, in an honest effort to correct a mistake, inserted the homestead which had been omitted from the description, the mortgage, though not rendered invalid as to the other lands, is inoperative as to the homestead. As to this, the deed is not her act. *Foote* v. *Humbrick*, 157.

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4. *Homestead. Conveyance. Failure of wife to sign. Doing equity.*

Although the wife must join in a conveyance of her husband's homestead, she has no estate therein, and is not a proper party to a bill by him to cancel a trust-deed thereon given by him alone; and he cannot, by joining her as a complainant, avoid the requirement in a court of chancery of doing equity by offering to pay the secured debt. *Massey* v. *Womble*, 69 Miss., 347, distinguished. *Pounds* v. *Clarke*, 263.

5. *Transfers between husband and wife. Code* 1880, § 1178, *not retroactive.*

Section 1178, code 1880, declaring invalid all unrecorded transfers between husband and wife, does not affect transactions prior to the adoption of the code. *Walker* v. *Marseilles*, 283.

6. *Same. Gift in another state. Conflict of laws.*

A statute of Alabama, under which an unrecorded transfer between husband and wife, though good as between the parties, is void as to creditors and purchasers, cannot have any operation as to transactions made after removal of the parties and property to this state. *Ib.*

7. *Personal property. Purchase by wife. Payment by husband. Title.*

The title of the wife to personal property bought by her is not affected by the mere act of her husband in afterward giving his note for the purchase-money, and paying it out of the proceeds of crops grown on his land. *Ib.*

8. *Adverse possession. Joint occupancy. Title.*

Where a husband has conveyed land to his wife, although confessedly in fraud of his creditors, and they continue, as before, to occupy it together as their home, their joint possession will be referred to her title, and, after her death, he cannot claim, as against her heirs, that his possession was adverse to her. *Claughton* v. *Claughton*, 384.

9. *Homestead. Sale of trees. Joinder by wife. Code* 1880, § 1258.

Growing trees are part of the realty. Hence, a conveyance by a husband of all the merchantable timber on his homestead, with an indefinite time for its removal, is an incumbrance of such homestead, and void if the wife does not join. So held where the sale of the timber would reduce by one-half the value of the homestead. *McKenzie* v. *Shows*, 388.

10. *Conveyance of homestead. Failure of wife to join. Effect.*

A conveyance of his homestead by a husband, without his wife's joinder, does not pass an estate in expectancy to vest when the land ceases to be a homestead. It conveys no estate whatever. *Ib.*

11. *Assumpsit. Purchase-money of land. Liability therefor.*

Where, after the death of his wife, a husband sells land of which she died seized, her heirs joining in the conveyance, with the agreement that they

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are to receive the purchase-money, which, however, he appropriates, he is answerable to them for the same, regardless of any express promise to pay. *Martin* v. *Tillman*, 614.

12. *Tenant by curtesy. Rents. Money had and received.*

In such case, although the husband was then (1876) entitled to possession of the land as tenant by the curtesy, it is error to deduct from the amount due the heirs any thing on account of rents, they having signed the deed upon the promise of their father to pay them the amount received as purchase-money. *Ib.*

13. *Estoppel Void sale by trustee. Discharge of incumbrance.*

Where a husband, having conveyed land to a trustee to hold in trust for his wife, afterwards, under alleged authority from the trustee, makes an unauthorized sale thereof, the mere fact that he applied a part of the purchase-money to discharge an incumbrance on the property made by the wife, will not estop her to recover the land. *Edwards* v. *Hillier*, 803.

INDICTMENT.

1. *Enticing away "laborer." Cropper. Act* 1890.

One hired to work land for a part of the crop, is a "laborer," within the meaning of chapter 56 (Laws 1890, p. 69), making it unlawful "to entice away, knowingly employ or induce a laborer" to leave his employer before his contract has expired, without the employer's consent. The absence of such consent by the employer is a necessary ingredient of the offense, and must be averred in the indictment and proved. *Ward* v. *State*, 245.

2. *Attorney before grand jury. Improper influence.*

Where an attorney, who, though not employed to prosecute, goes before the grand jury, and, as a private prosecutor—not a witness—uses his influence in furtherance of a presentment, which is made, the indictment will be held invalid. *Wilson* v. *State*, 595.

3. *Liquors. Sale without authority of law.*

An indictment is good which charges, generally, a sale of liquor without authority of law. *West* v. *State*, 598.

4. *Same. Local option law of* 1886. *Allegation of election.*

Tested by the law in force before the code of 1892 went into effect, a count in an indictment for selling liquor in violation of the local option law of 1886, which fails to aver that said law had been put in force by an election in the county, is bad. *Ib.*

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5. *Criminal procedure. One count good. Conviction.*

A demurrer to an indictment containing one good count is properly overruled; and so of a motion in arrest. But a conviction will not be sustained if the evidence fails to support the good count. *Ib.*

6. *Statutory offense. Averments. Words of statute.*

Where the language of a criminal statute is broader than its purpose, and, under certain circumstances, it may be lawful to do the thing forbidden by the words, if taken literally, it is not sufficient to indict in the statutory language. The indictment must charge, in apt language, the facts which make the act unlawful. *Rawles* v. *State*, 739.

7. *Keeping gaming-table. Averring unlawful act. Code* 1892, § 1124.

By § 1124, code 1892, which forbids keeping or exhibiting certain gaming-tables or banks, it was not intended to make criminal the mere act of keeping or exhibiting these. The object was to prevent gambling, and, in an indictment under the statute, the unlawful purpose of keeping a gaming-table or bank must be alleged; the facts must be stated which make the keeping or exhibiting unlawful. *Ib.*

INFANT.

1. *Replevin for property sold. Defense. Estoppel.*

Where one, during infancy, sells personal property, receiving part of the price, and on attaining majority brings replevin for the property, and the suit is defended upon a general denial of his right to the property, it will not avail the defendant to show at the trial that there had been no formal renunciation of the contract of sale before suit. *George* v. *Hewlett*, 1.

2. *Same. Placing in statu quo. Practice. Estoppel.*

Nor can the defendant, after such general denial of plaintiff's right, rely upon the defense that he had advanced, for the minor, money to pay certain storage charges on the property, and that plaintiff had failed to pay or tender him the amount before suit. *Ib.*

3. *Chancery court. Protection of minors. Guardian ad litem. Evidence.*

Although the guardian *ad litem* of minor parties to a suit has filed for them a mere formal answer, it is his duty to object to incompetent testimony that affects adversely their interest. But, regardless of the failure of the guardian *ad litem* to object, the chancery court should, of its own motion, reject such testimony. *Neblett* v. *Neblett*, 572.

4. *Estoppel. Partition. Receiving proceeds.*

Where an infant owns an interest in land, a part of which is allotted to her by partition, and this is sold by her guardian, who, after her major-

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ity, accounts for and pays over to her the proceeds of sale, she will be estopped from afterwards questioning the legality of the partition proceedings and claiming an interest in the remainder of the land. *Young* v. *Walker*, 813.

INJUNCTION.

1. *Multiplicity of suits. Separate actions of trespass.*

Where a number of independent property owners have brought separate actions at law to recover damages of a railroad company for the burning of their property, it cannot enjoin them in equity, on the ground of preventing a multiplicity of suits, although the burning of all resulted from the same alleged negligent act, and all the actions involve the same question of law and fact. *Tribette* v. *Railroad Co.*, 182.

2. *Dissolution. Dismissal without prejudice. Effect.*

The dismissal of an injunction suit at the hearing operates as a dissolution of the injunction, and entitles the obligees in the injunction bond to sue for a breach thereof. In such suit the decree of dismissal, though made "without prejudice," is conclusive evidence that the injunction was wrongfully sued out. *Yale* v. *Baum*, 225.

3. *Jurisdiction. Remedy at law. Supersedeas.*

Where, pending a motion in the circuit court by defendant to set aside a judgment by default, the respective attorneys agree in writing that judgment shall stand in favor of plaintiff for a less amount, and execution issues therefor, the defendant, who repudiates the compromise, denying the authority of his counsel to make it, cannot enjoin the execution in equity, for his remedy at law by supersedeas is plain and adequate. *Ricks* v. *Richardson*, 424.

4. *Same. Matters pending in circuit court. No relief in equity.*

And, besides, where the matters in controversy between the parties are actually pending in the circuit court, the chancery court will not take cognizance of them, since so to do might lead to different results in the two courts. *Ib.*

5. *Equity jurisdiction. Criminal prosecution.*

Equity has no jurisdiction to enjoin one from making affidavit charging a criminal offense. It is immaterial that the prosecution is alleged to be groundless, and that the defendant has threatened to continue to have the complainant arrested from day to day as a trespasser because of his occupancy of certain premises the possession of which the defendant claims. *Crighton* v. *Dahmer*, 602.

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INN-KEEPER.

Negligence. Injury to guest. Contributory negligence.

A declaration alleged that plaintiff, a guest at a watering-place, occupied a room in a cottage separate from the main hotel, the room being at the end of a gallery five feet high, unprotected by a railing; that on going to supper, it being dark, she left the door open and a light burning, to guide her on returning; that a servant of the hotel closed the door, and, by reason of this, and of the failure by defendants, the proprietors, to provide a railing and lights, plaintiff fell from the gallery and was injured. *Held*, a demurrer to the declaration was properly sustained, since the defendants were under no obligation to provide a railing, and plaintiff was negligent in going on despite the absence of the light. *Sneed* v. *Moorehead*, 690.

INNOCENT PURCHASER.

See BONA FIDE PURCHASER.

INSTRUCTION.

1. *Peremptory. When refused. Evidence to warrant verdict.*

Where the evidence is sufficient to warrant a verdict for the plaintiff in any view of it which may be legally taken, it is proper to refuse a peremptory instruction to find for the defendant, and a verdict for the plaintiff will be sustained. *Railroad Co.* v. *Boehms*, 11.

2. *Weight of evidence. Assuming facts.*

An instruction is not objectionable, as being on the weight of evidence, because it assumes as true matters proven by both parties, or about which there is no controversy. *Railway Co.* v. *Phillips*, 14.

3. *Criminal law. Uncertainty. Case.*

On a trial for wrecking a train, the court instructed the jury, for the state, "that in determining their verdict they are not circumscribed nor confined to the testimony of witnesses, but can consider all the circumstances surrounding the case; and it is not necessary to prove the actual facts of the conspiracy to wreck a train, but that it may be collected from collateral circumstances, if any, which may be in evidence." *Held*, if this instruction means that the jury is not confined to the testimony of witnesses, when there is no other evidence before it, it is erroneous; if it intended to declare that facts need not be established by positive testimony of witnesses, but may be proved by circumstances, it is objectionable for vagueness. *Nail* v. *State*, 32.

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4. *Running trains. Speed. Negligence. Code* 1880, § 1407.

In an action for the value of property destroyed by the alleged negligence of defendant, where there is evidence that the train which set out the fire was running within an incorporated town more than six miles an hour, in violation of § 1407, code 1880, an instruction for defendant is erroneous which assumes to state the duties of defendant under the circumstances, but is silent as to the presumption of negligence arising under said statute from the rate of speed, if found to be excessive. *Home Ins. Co.* v. *Railway Co.*, 119.

5. *Same. Fires. Definition of negligence.*

In an action involving the alleged negligence of a railroad company in emitting sparks and burning adjacent property, the giving of an instruction defining negligence, which, in effect, declares that the company's servants are required only to act with regard to known circumstances, and ignores the fact that not knowing may itself be negligence, will not cause a reversal where the record discloses no material circumstances unknown to such servants, which it is their duty to know and act upon in managing locomotives. *Ib.*

6. *Contract. Written proposal and acceptance. Oral evidence.*

Where plaintiff's letter to defendant proposing to enter his service on certain clearly specified terms, and the defendant's letter in reply accepting the offer, are in evidence and not disputed, it is error to refuse an instruction that these constitute the contract, notwithstanding plaintiff has sworn that the contract was an oral one, made prior to the date of the letters. *Odeneal* v. *Henry*, 172.

7. *Discharge of employe. Reasons assigned.*

Where defendant, having previously expressed dissatisfaction with plaintiff as manager of his dairy farm, wrote him a letter discharging him, assigning some reasons, but also expressing generally his dissatisfaction, and refusing to go into details, and, when sued, produced evidence to justify the discharge on other grounds, an instruction is improper which tells the jury that the reasons stated in the letter do not justify the discharge. Thus to single out and pronounce upon the evidence disconnected from other facts, is erroneous, as being calculated to mislead the jury. *Ib.*

8. *Erroneous instruction. Modification of; who may complain.*

One who has asked an erroneous instruction cannot assign for error its modification, for, if not content with it as modified, he should have declined to read it to the jury. *Railway Co.* v. *Suddoth*, 265.

9. *Instruction aimed at witness. Uncontradicted testimony.*

Where the testimony of the only witness for defendant is uncontradicted, and not improbable or unreasonable, it is error to give an instruction at

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the instance of plaintiff that if any witness has knowingly testified falsely in a material matter, the jury may disbelieve him. *Railway Co.* v. *Tate*, 348.

10. *Contract. Performance; manner of.*

Where one contracting party is sued in damages for preventing the other from carrying out a contract to do certain work, an instruction for plaintiff is erroneous which, in effect, tells the jury that the defendant, under circumstances named therein, had no right to stop plaintiff if he was prosecuting the work with proper diligence, omitting the qualification that he was doing it in a proper *manner*. *Water Co.* v. *Gorman*, 360.

11. *Same. Misleading instruction. Damages.*

Such an instruction is also erroneous which refers to different occasions on which plaintiff's work was interfered with, and, accumulating the several hinderances, directs that the jury shall make the plaintiff whole "for the loss thereby occasioned," when it appears that in respect to one or more of the occasions the defendant is not liable. *Ib.*

12. *Evidence. Dying declaration. Credit of. Circumstances.*

On a murder trial it is proper to instruct that the jury may consider all the circumstances under which a dying declaration in evidence was made, and give it such credit as the jury may think it fairly entitled to in the light of all the evidence, as in case of the testimony of a witness. *Harrison Jones* v. *State*, 401.

13. *Murder. Conviction of manslaughter.*

One tried for murder, but convicted of manslaughter only, cannot complain of a charge, warranted by the evidence, instructing the jury as to a conviction for murder. *Ib.*

14. *Attachment. Damages. Act* 1884. *Special verdict.*

Under the act of 1884 (Laws, p. 76) the jury, in attachment, may assess punitive damages against the plaintiff, if it certifies in the verdict that it believes that the attachment was sued out "recklessly or wantonly, and without probable cause, or with intent to oppress the defendant." In such case, the plaintiff cannot complain of instructions that impose on defendant the greater burden of showing that the attachment was *maliciously* sued out. *Mack* v. *Jacobs*, 429.

15. *Damages. Implied from tort.*

In an action of tort, it is error to instruct that if plaintiff has failed to prove any "damages, either actual or possible, the verdict should be for defendant." The law implies damages for every wrong. *Rose* v. *Railway Co.*, 725.

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16. *Contributory negligence. Question for jury.*

In an action against a railroad company for damage to horses transported, where the question is the alleged contributory negligence of plaintiffs in failing to feed the horses at a certain station, whereby, it is claimed, they became weak and more subject to injury, it is error to charge, as matter of law, that plaintiffs were not negligent as to this if they were informed by an employe of defendant that the cars containing the horses would not be delayed at such station. In such case, the question of contributory negligence is one of fact for the jury. *Railroad Co.* v. *Mullins*, 730.

17. *Insurance policy. Action on. False swearing.*

In an action on a fire insurance policy, where the dispute is as to the value of the property destroyed (defendant claiming that plaintiff swore falsely, and obtaining an instruction that, if he did wilfully swear falsely in making proof of loss, he cannot recover), a verdict for plaintiff, where the evidence of value is satisfactory, will not be disturbed because of an instruction, given at his instance, that "no false swearing in making proof of loss will avoid the policy, unless the evidence satisfies the jury that the plaintiff knowingly and intentionally swore falsely as to some material fact," and that the burden of proof is on the defendant to show the wilful intent. *Insurance Co.* v. *Summerfield*, 827.

18. *Ejectment. Disputed boundary line. Parol agreement.*

In an action of ejectment growing out of a dispute as to the location of a division line, if the plaintiff shows that the land in controversy is within the calls of his deed, and the defendant relies upon an alleged parol agreement, by which the line was fixed at the place contended for by him, the burden of proof is upon him to show such agreement, and it is proper so to instruct the jury. *Archer* v. *Helm*, 874.

19. *Same. Parol agreement. Permanent location.*

In such case, the parol agreement, to be valid, must, in effect, permanently locate the division line, and it is not error so to instruct the jury. *Ib.*

INSURANCE COMPANIES.

Taxation. Domestic insurance company. Const. 1890, § 181.

Under § 181, constitution 1890, domestic insurance companies are protected against an aggregation of taxes, whether state, county, or municipal, in excess of the tax required of foreign insurance companies doing business in this state, until their assets become sufficient to yield an *ad valorem* tax, which, added to the privilege tax, will exceed the tax required of such foreign companies. *Brennan* v. *Insurance Co.*, 531.

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INSURANCE, FIRE.

Policy. Action on. False swearing. Instruction.

In an action on a fire insurance policy, where the dispute is as to the value of the property destroyed (defendant claiming that plaintiff swore falsely, and obtaining an instruction that, if he did wilfully swear falsely in making proof of loss, he cannot recover), a verdict for plaintiff, where the evidence of value is satisfactory, will not be disturbed because of an instruction, given at his instance, that "no false swearing in making proof of loss will avoid the policy, unless the evidence satisfies the jury that the plaintiff knowingly and intentionally swore falsely as to some material fact," and that the burden of proof is on the defendant to show the wilful intent. *Insurance Co.* v. *Summerfield*, 827.

INTEREST AND USURY.

1. *Building and loan associations. Premium for loans.*

A loan by a building and loan association is not rendered usurious by a premium, which the borrowing member agrees to pay for the loan, since such premium is neither a prepayment of interest nor a deduction of money belonging to the member, but merely represents the agreed discount of the future dividends of his shares of stock. *Sullivan* v. *Building & Loan Association*, 94.

2. *Same. Interest on premium.*

But, to the extent that the loan contract stipulates for interest on said premium, it is illegal and essentially usurious. So held, where a member bids off a loan of $1,000 at a premium of 40 per cent., receiving in cash $600, but contracts to pay the whole $1,000, with interest thereon at the rate of 8 per cent. per annum. *Ib.*

3. *Same. Act of* 1886. *"Money advanced or loaned." Premium.*

The act of 1886 (Laws, p. 35), excepting building and loan associations from the prohibition against taking more than 10 per cent. interest, does not authorize such associations to charge interest on the premiums stipulated to be paid by its members for loans. They are not "money advanced or loaned," within the meaning of said act. *Ib.*

4. *Joint venture. Sharing profits.*

A contract by which complainant is to advance money to publish and introduce defendant's book, and, in consideration thereof, is to be paid his advances, with legal interest, out of the net profits, if any, and also one-half of such profits, imposes no personal liability on defendant, and is not usurious. *Duval* v. *Neal*, 288.

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5. *Assignment for creditors. Preference. Usurious debt.*

An assignment for creditors is not rendered invalid by the preference of a creditor whose debt embraces usury, if the amount directed to be paid does not exceed the principal due and legal interest thereon. The assignor may waive his personal privilege, under the statute, of defeating all interest. *Wetter* v. *Dinkins*, 835.

6. *Same. Preference. Innocent mistake. Validity.*

If in such case the assignor intends to prefer such debt purged of excessive interest, but, through mistake in computing the amount, fails to eliminate all of the excessive interest (the assignee being directed to pay only the amounts justly due all creditors), the assignment will not be rendered invalid. *Ib.*

INTERSTATE COMMERCE.

City ordinance. License tax. Citizen of another state.

A city ordinance imposing a license tax on transient peddlers, so far as it applies to a non-resident traveling agent selling goods by sample for a corporation in another state, though the goods are sent to him for delivery, is void as an attempt to regulate interstate commerce. *Asher* v. *Texas*, 128 U. S., 129, followed. *Overton* v. *Vicksburg*, 558.

JEOFAILS.

Verdict. Insufficient evidence. Pleading. Code 1892, § 746.

The statute of jeofails cures only defects of *pleading*. Where the facts are made of record by demurrer to evidence, they must show a right of recovery in order to sustain a verdict for plaintiff. If such right does not appear, after verdict, it will not avail plaintiff that the declaration, being insufficient, was not demurred to, and that the evidence fully supports the allegations that are made. *Holmes* v. *Preston*, 152.

JUDGMENT AND DECREE.

1. *Practice. Judgment by default. Plea on file. Error.*

A judgment by default, rendered when there is a plea undisposed of which is a full answer to the declaration, will be reversed. *Hambrick* v. *Dent*, 59.

2. *Garnishment. Void return. Judgment thereon. Code* 1880, § 2443.

Where a writ of garnishment omits to require an answer *in writing*, or to require the garnishee to answer whether he was indebted to defendant *at the time of the summoning of the garnishee, or* since that time, or whether he has *since* had effects of defendant, a return by the officer that he had handed to the garnishee "a true notice of the within," is insufficient, since

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notice of every thing in the writ would not be a compliance with § 2443, code 1880, which entitles the garnishee to notice in writing of the answer he is required to make. A judgment by default on such return will be reversed. *Acme Lumber Co.* v. *Vandergrift*, 91.

3. *Injunction. Dissolution. Dismissal without prejudice. Effect.*

The dismissal of an injunction suit at the hearing operates as a dissolution of the injunction, and entitles the obligees in the injunction bond to sue for a breach thereof. In such suit the decree of dismissal, though made "without prejudice," is conclusive evidence that the injunction was wrongfully sued out. *Yale* v. *Baum*, 225.

4. *Chancery court. Set-off. Assignment.*

Where, pending an action, defendant therein recovers a judgment against plaintiff, the latter, after recovering his judgment, cannot maintain a bill in chancery to compel setting off the two judgments, if, before such recovery by plaintiff, defendant had assigned his judgment. *Holly* v. *Cook*, 590.

5. *Set-off. Judgments. Assignment. Notice. Code* 1880, § 1124.

In such case, it is immaterial that, when plaintiff recovered his judgment, he had no notice of such assignment by defendant. Section 1124, code 1880, providing for the assertion of off-sets and other defenses against notes and other writings for the payment of money had prior to notice of their assignment, has no application to judgments. *Ib.*

6. *Garnishment. Service. Judgment by default. Code* 1892, §§ 2134, 3417.

Section 2134, code 1892, requires writs of garnishment to be served as a summons. Under § 3417, where the service is within five days before the return-day, the garnishee is not required to answer until the next term. In such case, judgment by default cannot be taken against him before the next term, and the fact that five days have elapsed after service, and before entry of the judgment, does not change this. *Alexander* v. *Lloyd*, 662.

7. *Appearance. Form of plea. Effect. Judgment.*

Where an appellant claims that a plea (which is somewhat ambiguous in form) was intended only as an appearance for a co-defendant, if the plea as filed would have been sufficient to prevent a judgment by default against appellant, it will be treated as an appearance for him, and a judgment for plaintiff based thereon will be sustained. *Solomon* v. *Compress Co.*, 822.

8. *Attack. Want of notice. Clear proof.*

One alleging want of notice, in attacking a judgment against himself which is apparently valid, must make the clearest and most convincing proof. *Quarles* v. *Hiern*, 891.

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JURISDICTION.

1. *Constitutional law. Mayor as ex officio justice of the peace.*

Under constitution 1869, providing for the election in each county, by districts, of a competent number of justices of the peace, it was not in the power of the legislature to give the mayor of a town the jurisdiction of a justice as to that part of the justice's district outside the town. *Heggie* v. *Stone*, 39.

2. *Waiver. Appeal to circuit court. Code* 1880, § 2354.

When, by a town charter, the jurisdiction of a justice for the entire district is attempted to be vested in the mayor, one residing outside the corporate limits, though within the district, who is sued before such officer, does not, by appearing and defending on the merits, waive the right to urge in the circuit court, on appeal, the want of jurisdiction, since § 2354, code 1880, provides for a trial *de novo* on appeal, and requires the circuit court to dismiss causes where the justice had no jurisdiction. *Ib.*

3. *Chancery. Multiplicity. Community of interest. Legal demands.*

The jurisdiction of equity to prevent a multiplicity of suits does not extend to enjoining a number of separate actions at law against the same defendant to recover damages, where the plaintiffs have no community of interest, except in the question of law and fact involved, and cannot be proceeded against separately in equity. *Tribette* v. *Railroad Co.*, 182.

4. *Justice of the peace. Attachment. Code* 1880, §§ 2191, 2475.

Under §§ 2191, 2475, code 1880, a justice of the peace has jurisdiction to issue the writ and try the cause in an attachment suit against a non-resident, although the only property attached is in another district of the county; and this, too, where there is a qualified and acting justice in such other district. *Griggs* v. *Piano Co.*, 211.

5. *Attachment in chancery. Non-resident. Remedy at law.*

Independently of statute, by virtue of its general equity powers, a chancery court may, without a judgment at law and *nulla bona* return, subject to the demands of creditors the effects in this state of a non-resident debtor. *Zecharie* v. *Bowers*, 1 Smed. & M., 584, overruled. *Dollman* v. *Moore*, 267.

6. *Equitable defense. Action at law. Marshaling.*

Ordinarily, a court of law, trying legal titles, cannot marshal securities. The right can be availed of only in those exceptional cases where an equitable defense is permitted to which the right of marshaling is a reply. *Black* v. *Robinson*, 61 Miss., 54, distinguished. *Barlow* v. *Brittain*, 427.

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7. *Justice of the peace. Action on penal statutes.*

The jurisdiction "of all actions for the recovery of debts or damages or personal property" conferred on justices of the peace by code 1871, § 1302, and code 1880, § 2190 (code 1892, § 2394), embraces suits "founded on any penal statute," although these words, which appear in the corresponding article of code 1857 (p. 405), were not brought forward. *Telegraph Co.* v. *Sullivan*, 447.

8. *Same. Appeal. Penalty less than fifty dollars. Code* 1880, § 2354.

Accordingly, the jurisdiction of the circuit courts in suits for penalties, where the principal of the demand does not exceed $150, is purely appellate, and if the amount in controversy does not exceed $50, no appeal lies to the supreme court. *Ib.*

9. *Chancery court. Const.* 1890, § 161. *Action of trespass.*

Section 161, constitution 1890, giving the chancery court jurisdiction concurrent with the circuit court "of suits on bonds of public officers for failure to account for money or property received, or wasted or lost by neglect," does not confer on such court jurisdiction of a suit on the bond of a sheriff who has made an excessive levy of attachment on personal property, a part of which is destroyed while in his custody. Although discovery is asked as to the articles destroyed, this is simply an action of damages for trespass, cognizable only at law. *Cazeneuve* v. *Curell*, 521.

10. *Same. Const.* 1890, § 147. *Supreme court. Inability to reverse.*

But, under § 147 of the constitution, which forbids the reversal of any judgment or decree on the ground of want of jurisdiction arising from error as to whether the cause is of equity or common law jurisdiction, if the chancery court, though erroneously, assumes jurisdiction of such action of trespass, the supreme court is powerless to interfere. *Ib.*

11. *Same. Const.* 1890, § 147. *Not confined to final decrees.*

This restriction upon the power of the supreme court to reverse is not confined to final judgments or decrees, but applies also to appeals from interlocutory orders or decrees where the question of jurisdiction is directly raised. *Ib.*

12. *Chancery court. Injunction. Criminal prosecution.*

Equity has no jurisdiction to enjoin one from making affidavit charging a criminal offense. It is immaterial that the prosecution is alleged to be groundless, and that the defendant has threatened to continue to have the complainant arrested from day to day as a trespasser because of his occupancy of certain premises the possession of which the defendant claims. *Crighton* v. *Dahmer*, 602.

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13. *Chancery. Fraudulent conveyances. Const.* 1890, § 159. *Code* 1880, § 1843.

Section 159, constitution 1890, by conferring on the chancery court jurisdiction in all cases of which it had jurisdiction when the constitution was put in operation, confirmed in that court the jurisdiction it possessed under § 1843, code 1880, of bills exhibited by creditors without judgment to set aside fraudulent conveyances and other devices to hinder and delay creditors. Such jurisdiction is not affected by § 31 of the said constitution, declaring that the right of trial by jury shall remain inviolate. *McBride* v. *State*, 716.

14. *Same. Vacating collusive attachments. Remedy at law.*

Accordingly, such creditors may proceed in the chancery court to vacate attachments fraudulently sued out through collusion with the debtor, and to subject the attached property to their demands, and this though, by statute, they have a remedy at law by intervening and contesting the attachments. *Ib.*

15. *Removal of causes. Waiver. Federal question.*

A citizen of Tennessee brought two suits in the court below against appellant, the Phœnix Insurance Company, a citizen of Connecticut, one on a policy for $3,000, and the other on a policy for $2,000. At the return-term defendant pleaded to the merits in both cases, and they were continued. Afterwards, during the term, defendant presented a petition and bond in each case to remove the same to the federal court. In each petition it was averred that the "amount involved is $2,000." No action was taken on the petitions, and afterwards defendant filed other pleas. At the next term, on defendant's motion, the cases were consolidated, and defendant, by leave, withdrew its pleas and petitions for removal, and filed a new petition and bond to remove the case, as consolidated, to the federal court. Removal was denied. *Held*, in the absence of an authoritative decision by the supreme court of the United States on the federal question involved, as matter of policy rather than conviction, in view of the history of the case, that the action of the court in refusing the removal would not be disturbed. *Insurance Co.* v. *Summerfield*, 827.

16. *Justice court. Appeal. Dismissal. Code* 1880, § 2354.

Under § 2354, code 1880, it is only where the justice has no jurisdiction, and not where he makes an erroneous decision within his jurisdiction, that the case is to be dismissed by the circuit court on appeal. *Goodbar* v. *Owen*, 840.

JURY.

1. *Qualification of jurors. Const.* 1890, §§ 241, 264, 274, 276. *Code* 1880, § 1661.

Section 264, constitution 1890, declaring that no person shall be a grand or petit juror unless a qualified elector, and § 241, which provides that

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no one shall be a qualified elector unless registered, were suspended in their operation—the former by § 274 until April 1, 1892, because of repugnancy to § 1661, code 1880, and the latter by § 276 of the constitution until January 1, 1891; but, since registration under the constitution was left to be provided for by the legislature, which was not to meet until January, 1892, these sections, so far as they required registration as a qualification for voters or jurors, were impliedly and of necessity further suspended until the registration to be provided for by the legislature could be had. *Nail* v. *State*, 32.

2. *Juror not registered. When not ground for challenge.*

Accordingly, after April 1, 1892, but before the registration of voters provided for by the legislature in 1892, it was not a good ground for challenging a juror, otherwise qualified as a voter, that he had not registered under the constitution of 1890. *Ib.*

3. *Qualification of jurors. Non-payment of poll-tax.*

But, if it was further objected that such juror had not paid his poll-tax as required by § 241, constitution 1890, and was, therefore, ineligible to registration, the challenge should have been allowed, for, as to this qualification, said section was not impliedly or of necessity suspended to await legislation, and the juror could not have registered if opportunity had been offered. *Ib.*

4. *Challenging incompetent juror. Reversible error. Const.* 1890, § 264.

Where defendant's peremptory challenges have been exhausted, refusal by the court to set aside an incompetent juror upon the challenge of the accused is reversible error. Constitution 1890, § 264, declaring that "the want of any such [constitutional] qualification in any juror shall not vitiate any indictment or verdict," does not apply where the judgment is assailed because of the court's action in overruling an exception seasonably made to a juror. *Ib.*

5. *Void conviction. Jury of eleven. Record. Parol evidence.*

Where the record of a conviction in the circuit court recites that the accused was tried by a jury, whose names are given, and only eleven names appear, the conviction is void, and parol evidence is inadmissible to show that the trial was by twelve men, and that by a clerical error the name of one was omitted. *Scott* v. *State*, 247.

6. *Criminal procedure. Impaneling jury. Challenges. Full panel.*

Under § 1423, code 1892, providing that "all peremptory challenges by the state shall be made before the jury is presented to the prisoner, and, in all cases, the accused shall have presented to him a full panel before being called upon to make his peremptory challenges," the accused in any criminal case is entitled, after the tender of a full panel and his chal-

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lenging any of the jurors thereon, to have the panel again completed by the state before he is required to pass on the jurors added; and, if he again excuses any of the added jurors, the state must again fill the panel before tendering new jurors; and so on, in this manner, until a jury is secured. If the accused is required, over his objection, to challenge individual jurors as presented, it is error for which a judgment of conviction will be reversed. *Gibson* v. *State*, 554.

7. *Trial. Presence of accused. Code* 1892, § 2391. *Constitutionality.*

The constitutional provision that one accused of crime shall be confronted by the witnesses against him, requires that all evidence, whether of living witnesses or inanimate objects, be produced before the jury in the presence of the accused and the court. Section 2391, code 1892, to the extent that it authorizes a jury, in a criminal case, to visit the scene of the offense unaccompanied by the accused or the court, is unconstitutional. *Foster* v. *State*, 755.

8. *Same. Jury; visiting scene of homicide. Case.*

Accordingly, where a homicide occurred in a railway-coach, and, pending the trial for murder, the jury visit the scene, accompanied by the accused, but the latter is prevented by the officer from entering the coach with the jury, this is a denial of his constitutional right to be present when evidence is introduced, notwithstanding the jury remains in the coach only two or three minutes, and it is only for a part of this time that the accused is excluded. *Ib.*

JUSTICE OF THE PEACE.

1. *Constitutional law. Mayor as ex officio justice. Jurisdiction.*

Under constitution 1869, providing for the election in each county, by districts, of a competent number of justices of the peace, it was not in the power of the legislature to give the mayor of a town the jurisdiction of a justice as to that part of the justice's district outside the town. *Heggie* v. *Stone*, 39.

2. *Jurisdiction. Waiver. Appeal to circuit court. Code* 1880, § 2354.

When, by a town charter, the jurisdiction of a justice for the entire district is attempted to be vested in the mayor, one residing outside the corporate limits, though within the district, who is sued before such officer, does not, by appearing and defending on the merits, waive the right to urge in the circuit court, on appeal, the want of jurisdiction, since § 2354, code 1880, provides for a trial *de novo* on appeal, and requires the circuit court to dismiss causes where the justice had no jurisdiction. *Ib.*

3. *Same. Attachment. Code* 1880, §§ 2191, 2475.

Under §§ 2191, 2475, code 1880, a justice of the peace has jurisdiction to issue the writ and try the cause in an attachment suit against a non-

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resident, although the only property attached is in another district of the county; and this, too, where there is a qualified and acting justice in such other district. *Griggs* v. *Piano Co.*, 211.

4. *Vacancy in office. Constitution* 1890, § 103.

The mode of filling vacancies in the office of justice of the peace is, by § 103, constitution 1890, committed entirely to the legislature. *State* v. *Lovell*, 309.

5. *Jurisdiction. Action on penal statutes.*

The jurisdiction of "all actions for the recovery of debts or damages or personal property" conferred on justices of the peace by code 1871, § 1302, and code 1880, § 2190 (code 1892, § 2394), embraces suits "founded on any penal statute," although these words, which appear in the corresponding article of code 1857 (p. 405), were not brought forward. *Telegraph Co.* v. *Sullivan*, 447.

6. *Trial. Notice to defendant. Emergency. Code* 1880, § 2194.

Under § 2194, code 1880, when the plaintiff or defendant in a justice court is a non-resident or transient person, and it is made to appear by affidavit that a delay of the trial until the regular term would be of material injury, the justice may have the parties summoned to appear at any "reasonable time," to be named by him, and give judgment. *Goodbar* v. *Owen*, 840.

7. *Jurisdiction. Appeal. Trial de novo. Code* 1880, § 2354.

What is a reasonable time is a question for the decision of the justice. Service of the writ gives him jurisdiction of the defendant, and, where he has jurisdiction of the subject, and the defendant appeals, the circuit court cannot dismiss the case on the ground that reasonable time was not given. In such case, under § 2354, code 1880, the case will be tried anew on its merits in the circuit court. In order to challenge the decision of the justice on questions of law only, the remedy is by *certiorari*. *Ib.*

LABORER.

1. *Criminal law. Enticing away. Cropper. Act* 1890.

One hired to work land for a part of the crop, is a "laborer," within the meaning of chapter 56 (Laws 1890, p. 69), making it unlawful "to entice away, knowingly employ or induce a laborer" to leave his employer before his contract has expired, without the employer's consent. *Ward* v. *State*, 245.

2. *Same. Indictment. Evidence. Consent of employer.*

The absence of such consent by the employer is a necessary ingredient of the offense, and must be averred in the indictment and proved. *Ib.*

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LANDLORD AND TENANT.

1. *Lien. Supplies advanced by another. Guaranty.*

Under § 1301, code 1880, giving a landlord a lien on crops for advances made by him to his tenant for supplies, the lien does not exist if the landlord does not, either directly or through another, make the advances, but merely guarantees payment for supplies advanced to the tenant by another. To support such lien, the relation of creditor and debtor must exist between the landlord and tenant. *Ellis* v. *Jones*, 60.

2. *Same. Purchaser. Notice. Caveat emptor.*

In a suit against one who has purchased and converted agricultural products upon which the plaintiff has a landlord's lien, neither ignorance as to the tenancy nor false statement by the tenant as to his right to sell will defeat the landlord's claim. *Warren* v. *Jones*, 202.

3. *Same. "Supplies." Mules sold tenant. Code* 1880, § 1301.

Mules sold by a landlord to his tenant, necessary to the making of a crop, are "supplies" within the meaning of § 1301, code 1880, giving a landlord a lien on the crops of the tenant for supplies furnished during the year. *Trimble* v. *Durham*, 295.

4. *Same. Waiver. Separate note for supplies.*

In such case, the taking by the landlord of a separate note for the price of the mules, reciting that he retained his lien on the mules and crop until the note is paid, is not a waiver of the landlord's lien. *Ib.*

5. *Proceedings against tenant. Appeal. Recovery. Code* 1880, §§ 1343, 2657.

As § 2657, code 1880, gives a successful plaintiff in unlawful detainer the right, on appeal, to recover rent to the time of trial, and § 1343 provides that, in proceedings before a justice of the peace to recover possession of premises from a tenant in arrears for rent, "the right of appeal shall exist as in cases of unlawful detainer," on appeal to the circuit court in such proceedings against a tenant, a successful plaintiff may likewise recover rent to the time of trial. *Paxton* v. *Oliver*, 570.

6. *Attachment for rent. Statutory remedy. Demand must be for rent.*

To entitle a landlord to the statutory remedy of attachment for rent, it is essential that his demand shall be for rent. An agreement of the tenant, as part of the expressed consideration of a lease, to pay as rent a debt which is not such in fact, will not change this. *Paxton* v. *Kennedy*, 865.

LEGACY.

See WILL.

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LIMITATION OF ACTIONS.

1. *Statute. When not available by county. Warrants.*

There is no statute of limitations to bar proceedings to enforce payment of claims against a county which have been allowed by judgment of its authorities. *Taylor* v. *Chickasaw County*, 87.

2. *Same. Staleness no defense because of statute.*

A claim not barred by statute of limitations is good. Because of the existence of the statute, staleness is no defense. *Ib.*

3. *Estate of partner. Accounting. Code* 1880, § 2026.

An account on the books of a partnership against a deceased partner is not a claim against his estate required to be probated and registered under § 2026, code 1880; nor, before an accounting of the partnership assets, is it subject to the statute of limitations. *Jones* v. *Warren*, 227.

4. *Action on bond. When time begins to run.*

The duty of a guardian to account to the wards is part of the obligation of his bond. Accordingly, before a final accounting by the guardian, the statute of limitations does not run in favor of a surety as against the wards. *Bell* v. *Rudolph*, 234.

5. *Tax-title. Three years possession. Wild land. Code* 1880, § 539.

In order to entitle a purchaser at tax-sale to the benefit of the statute of limitations prescribed by § 539, code 1880, "the actual occupation for three years, after one year from the day of sale," must be of at least a part of the land, and must be continuous for three years. *Pearce* v. *Perkins*, 276.

6. *Same. Void description. Lapse of time. Code* 1871, § 1709.

Section 1709, code 1871, which prohibits suits to invalidate tax-titles after three years from the time of sale, does not apply where the tax-deed is void for uncertainty of description. *Ib.*

7. *Partition. Bill of review. Code* 1880, §§ 2568, 2681, 2693.

Section 2693, code 1880, denying any action to recover property sold under a chancery decree, after two years from date of possession taken by the purchaser, will not debar a minor interested in lands sold in partition proceeding from filing a bill of review at any time within two years after coming of age. Code 1880, §§ 2568, 2681. Partition proceedings are governed by an independent chapter of the code, to which the general provision in said § 2693 has no application. *Martin* v. *Gilleylen*, 324.

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8. *Enforcing legacy. Administration. Purchaser.*

Where a legacy is made a charge on the estate of the testator, and certain land of the estate is sold by the heir and devisee, pending administration on the estate and before final settlement, the statute of limitations does not run against the right to enforce the legacy as to the land so held by the purchaser. So held in this case, there being no question involving the right of the purchaser to hold by adverse possession. *Peebles* v. *Acker*, 356.

9. *Code* 1871, § 1709. *Lapse of three years. Irregularity.*

Under § 1709, code 1871, where more than three years elapsed after a sale of land for taxes, any mere irregularity, as an excessive levy, cannot be made available to defeat the tax-title. *Cole* v. *Coon*, 634.

10. *Same. Invoked without being pleaded.*

The curative effect of § 1709, code 1871, as to tax-sales, is always available where the facts make the statute applicable. Unlike a mere statute of limitations, it is not required that it shall be pleaded. It may be invoked on appeal for the first time. *Ib.*

11. *Adverse possession. Non-resident. Code* 1880, § 2678.

A non-resident may acquire title to land by adverse possession held for him by others for ten years. Absence from the state does not prevent the running of the statute in his favor, since ejectment can be brought against the tenant. It is only where a right of action accrues *in this state*, and the person liable goes from and resides out of it, that § 2678, code 1880, applies to prevent the period of such absence from being counted. *Lindenmeyer* v. *Gunst*, 693.

12. *Ejectment. Demand for rent. Six years.*

The statute of limitations of six years applies to the demand for rents asserted by a plaintiff in ejectment. *Ib.*

13. *Chancery court. Specific performance. Contract to convey. Doing equity.*

Although defendants, whose ancestor contracted to convey land upon payment of the contract price, are barred by lapse of time from recovering either the land or the price from the purchaser who entered under his contract, the representative of such purchaser who relies on the bar of the statute of limitations, cannot invoke the aid of equity to cancel defendant's claim to the land, unless he offers to pay the balance of the purchase-money and interest. Such a suit, though in form one to cancel clouds, is one for specific performance, which will not be decreed unless complainant offers to perform his part of the contract. *Nolan* v. *Snodgrass*, 794.

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14. *Bill of review. Dismissal. New suit. Code* 1880, §§ 2681, 2686.

Where a bill is filed by a ward, within two years after majority, to review a partition of land in which she was interested, made during minority, and also to surcharge the accounts of her guardian, and at the hearing, because of multifariousness, the bill is dismissed as to the partition without prejudice (relief being given as to the guardian's accounts), this is a dismissal for a "matter of form" within the meaning of § 2686, code 1880, and a new bill to review the partition proceedings may be filed within one year thereafter. *Young* v. *Walker*, 813.

LIQUORS, SALE OF.

1. *Code* 1880. *Laws* 1886, *p.* 35. *Alcohol; not "vinous or spirituous liquor."*

Alcohol is not "vinous or spirituous liquor," within the meaning of chapter 39, code 1880; and prior to the act of 1886 (Laws, p. 35), the statutes in this state relating to the sale of intoxicating liquors did not make it unlawful to sell alcohol. *Lemly* v. *State*, 241.

2. *Same. Alcohol. Indictment for selling.*

Accordingly, an indictment under the code of 1880, for the unlawful sale of alcohol, charges no offense. *Ib.*

3. *Beer. Privilege tax. Local option. Laws* 1886, *p.* 35.

As repeals by implication are not favored, the local option act of 1886 (Laws, p. 35) did not abrogate the law previously existing, by which persons could deal in malt liquors by simply paying a privilege tax. Therefore, where said law was put in force in any county by an election, one who had paid a privilege tax to sell beer could lawfully sell it, and was not required to present a petition and obtain a license as in case of persons retailing *vinous and spirituous* liquors. *Boswell* v. *State*, 395.

4. *Sale without authority of law. Indictment.*

An indictment is good which charges, generally, a sale of liquor without authority of law. *West* v. *State*, 598.

5. *Local option law of* 1886. *Indictment. Allegation of election.*

Tested by the law in force before the code of 1892 went into effect, a count in an indictment for selling liquor in violation of the local option law of 1886, which fails to aver that said law had been put in force by an election in the county, is bad. *Ib.*

6. *Code* 1892, *ch.* 37. *When taking effect. Unlawful retailing.*

Chapter 37, code 1892, entitled "Dram-shops," except as to license obtained after April 2, 1892, was not in force until November 1 following, and has no influence on indictments for unlawful retailing found before the chapter took effect. *Ib.*

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7. *"To sell." Laws* 1890, *p.* 71. *Receiving order.*

Accordingly, on the trial of an indictment under § 2 of the act of 1890 (Laws, p. 71), the words "to *sell* any such liquors as are therein prohibited," will not be held to include the mere receipt of an order for liquor to be thereafter sent into the forbidden territory, though it was so sent, and the defendant received pay for the same. *Ib.*

8. *Criminal procedure. Evidence of distinct sales.*

Where it is alleged that accused unlawfully sold spirituous liquors, it is error to admit evidence of two distinct sales. *Naul* v. *McComb City*, 699.

9. *Penalty. Recovery. Code* 1892, § 1590, *unconstitutional.*

Section 1590, code 1892, in providing that any person unlawfully selling or giving away liquors shall be liable to the state, town and county, each in the sum of $500, imposes a penalty, not a tax. And so much of the section as provides that the sheriff or state revenue agent can assess and collect such penalties by distress is unconstitutional, being within the prohibition of § 14, constitution 1890, against depriving of property without due process of law. *McBride* v. *State*, 716.

10. *Revenue agent. Action for penalties. Code* 1892, § 1590.

The state revenue agent cannot maintain an action for the penalties prescribed by said § 1590, code 1892, against persons unlawfully selling or giving away liquors. The section itself confers the right of action only on the state, county or town, and chapter 126 of said code, entitled "State Revenue Agent," confers on him a right of action only against fiscal officers and against persons owing unpaid taxes, and the penalty prescribed is not a tax. *Ib.*

11. *Local option law. Laws* 1886, *p.* 35. *Result of election. Evidence.*

By § 4 of the act of 1886 (Laws, p. 35), it is the duty of the election commissioners to canvass the returns of a local option election and declare the result. Their report is made evidence, and it is the sole evidence of the result, and cannot be questioned in a collateral attack. *Conrad* v. *State*, 733.

12. *Same. Report of commissioners. Collateral attack. Criminal law.*

The rule forbidding investigation, on a collateral inquiry, as to the sufficiency of the evidence on which such report was made, applies as well in criminal as in civil cases. Hence, on the trial of one indicted for the unlawful sale of liquor in a county where such election has been held, the report of the commissioners is conclusive as to the result. *Ib.*

13. *Result of election. Judicial notice. Code* 1892, § 1621. *Prior offense.*

On the trial of such a case, the court will, under § 1621, code 1892, take judicial notice of the result of the election, although held under the act of

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1886, and though the offense was committed before said section of the code became operative. The act being unlawful, whether the election resulted for or against the sale, the defendant's guilt or innocence is not involved in a decision of the question as to how the election resulted. *Ib.*

14. *License-tax. Action therefor. State revenue agent. Code* 1892, § 1590.

Under the code of 1892, no action can be brought against one retailing intoxicating liquors without license, except as provided by § 1590 imposing penalties of $500 recoverable by the state, county and city, respectively. A suit by the state revenue agent, to recover the license tax which such retailer should have paid, is not maintainable. *State* v. *Fragiacomo*, 799.

LOCAL OPTION LAW.

See LIQUORS, SALE OF.

MANDAMUS.

1. *Claims against county. Pleading.*

Mandamus lies to compel a county to pay claims allowed by its authorities; and it is sufficient for petitioner to set out unpaid warrants, averring that they are supported by judgments of allowance. *Taylor* v. *Chickasaw County*, 87.

2. *Assessment. Property escaping taxation. Code* 1880, §§ 486, 509, 513.

Section 486, code 1880, requires the assessor to assess property that has escaped taxation in former years. Section 509 authorizes him to add property to the roll after returning it to the board of supervisors, and before final action thereon. After that, by § 513, the *collector* is required to assess all property left unassessed. Under these provisions it is the duty of the assessor, at any time, to assess property that has escaped taxation for former years. This he may be compelled to do by mandamus, and it is immaterial that when the suit is brought the time has passed for him to make assessments for the current year. *State* v. *Simmons*, 485.

3. *Stock law. Fence between counties. Code* 1892, § 2061.

Mandamus lies to compel a board of supervisors to perform the duty imposed by § 2061, code 1892, as to jointly building and maintaining a fence on or near the county line, to prevent stock straying from a county in which the stock law has not been adopted into an adjoining county where it is in force. *Leflore Co.* v. *State*, 769.

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MARSHALING.

1. *Equitable defense. Action at law.*

Ordinarily, a court of law, trying legal titles, cannot marshal securities. The right can be availed of only in those exceptional cases where an equitable defense is permitted to which the right of marshaling is a reply. *Barlow* v. *Brittain*, 427.

2. *Trust-deed. Action for property converted. Defense.*

An action at law by the trustee in a deed of trust to recover the value of incumbered personal property, which has been purchased and converted, cannot be defended by showing that the debtor has other accessible property, subject to the deed, and sufficient to satisfy the debt secured thereby. *Ib.*

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. *Injury to servant. Contributory negligence.*

A servant who fails to use ordinary care in looking out for danger, and, as a consequence, is injured while in the discharge of a hazardous duty, cannot recover therefor on the ground that the master failed to use means to prevent the injury. *Capital Oil Works* v. *Black*, 8.

2. *Same. Alleged negligence of master. Case.*

The president of an oil company ordered out a loaded car, and as it rolled down the side-track he called to several employes present to know if any of them could couple it, when plaintiff, one of the laborers, who had some experience in handling cars, ran ahead of the car to couple it to another, the president urging him on, and at the same time directing another employe, a boy, to put on the brake, which, however, was not done. Plaintiff supposed the speed of the car would be controlled, and did not look back. It ran with force against the other car just as he reached it, injuring his hand. *Held*, that, as he might have seen the danger of the undertaking by looking, he could not recover for the injury. *Ib.*

3. *Railroads. Injury to employe. Unsafe appliance. Const.* 1890, § 193.

Section 193, constitution 1890, which provides that "knowledge by any employe injured of the defective or unsafe character or condition of any machinery, ways or appliance, shall be no defense to an action for injury caused thereby, except," etc., abolishes the defense of contributory neg-

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ligence in such actions, unless the negligence of such employe be wilful or reckless. *Welsh* v. *Railway Co.*, 20.

4. *Railroads. Wilful negligence of employe. Question of fact.*

Where, in such case, the employe testified that he had seen that the appliance causing the injury was defective, but had reported it and believed, or had reason to believe, it had been remedied, it was for the jury to say whether he was wilfully or recklessly negligent in his use of it. *Ib.*

5. *Same. Fires. Contributory negligence.*

In an action against a railway company to recover the value of a mill destroyed by fire, alleged to have been negligently set out by a locomotive, where it is shown that the employes of the mill were charged with the duty of extinguishing fires, it is not error to instruct that if, after discovering the fire, they could have extinguished it, but failed to use ordinary diligence in doing so, the plaintiff cannot recover. *Home Ins. Co.* v. *Railway Co.*, 119.

6. *Discharge of employe. Other employment. Burden of proof.*

In an action by an employe wrongfully discharged, to recover of his employer, as damages, the balance of the contract-price for the unexpired term of his employment, the burden of proof is on the defendant, if he defends upon the ground that plaintiff had or could have had other employment, and neglected to secure it. *Odeneal* v. *Henry*, 172.

7. *Discharge of employe. Reasons assigned. Instruction.*

Where defendant, having previously expressed dissatisfaction with plaintiff as manager of his dairy farm, wrote him a letter discharging him, assigning some reasons, but also expressing generally his dissatisfaction, and refusing to go into details, and, when sued, produced evidence to justify the discharge on other grounds, an instruction is improper which tells the jury that the reasons stated in the letter do not justify the discharge. Thus to single out and pronounce upon the evidence disconnected from other facts, is erroneous, as being calculated to mislead the jury. *Ib.*

8. *Same. Reasons for discharge. Knowledge of employer.*

If at the time of the discharge of an employe, sufficient grounds therefor actually existed, the employer is not liable in damages therefor, although he did not know of them at the time of the discharge, and may have assigned other reasons. *Ib.*

9. *Railroads. Liability to employe prior to constitution* 1890. *Negligence.*

In an action against a railroad company, where it is shown that injury was caused to an employe by the negligence of defendant, prior to the constitution of 1890, the law then in force governs. By it, the defend-

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ant is *prima facie* not liable to the employe for injury suffered in the service for which he was employed. *Railroad Co.* v. *Cathey*, 332.

10. *Act of servant outside of employment. Damages.*

Where a water company contracts for certain work to be done requiring excavations near its pump-house, and its engineer, as an accommodation for a servant of the contractor, agrees to look after a certain pump of the contractor, but negligently fails to do so, whereby the excavations are flooded from the works of the company, the latter is not liable to the contractor therefor. *Water Co.* v. *Gorman*, 360.

11. *Trespass. Cutting trees. Telegraph company.*

A telegraph company is liable, if its laborers, clearing its right of way, cut trees on adjoining land of another, although done contrary to the positive orders of the superintendent, if it resulted from the negligence of the latter in absenting himself, and intrusting the work to ordinary laborers, without supervision. *Clay* v. *Telegraph Co.*, 406.

12. *Railroads. Fellow-servant. Const.* 1890, § 193. *Fireman, telegraph operator.*

A fireman on a locomotive and a telegraph operator at one of the company's stations are engaged in different departments of labor, or "about a different piece of work," within the meaning of § 193, constitution 1890, and the railroad company is liable for the injury to or death of the fireman by a collision, resulting from the negligence of the operator. *Railroad Co.* v. *Hunter*, 471.

13. *Same. Const.* 1890, § 193. *Injuries causing death. Who may sue.*

For injuries to an employe resulting in death, an action against a railroad company, based on § 193, constitution 1890, as to fellow-servants, must be brought by "the legal or personal representative"—that is, by the executor or administrator of the decedent. *Ib.*

14. *Same. Negligence. Fellow-servant. Engineer and brakeman. Const.* 1890, § 193.

A railroad company is not liable for injury to a brakeman resulting from negligence of the engineer, who, after signaling for brakes, caused a sudden start of the train, while the brakeman was applying the brakes in obedience to the signal. While thus engaged in their routine duties in the operation of the train, the engineer is not "the superior agent or officer," or "person having the right to control or direct the services" of the brakeman, within the meaning of § 193, constitution 1890, regulating the liability of railroad companies for injuries to employes. *Evans* v. *Railway Co.*, 527.

15. *Same. Waiting-room. Expulsion of passenger. Master and servant.*

Where plaintiff, a colored woman, sues a railroad company for damages for being wrongfully and violently ejected from the waiting-room for

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whites, an instruction is erroneous that announces non-liability, merely if plaintiff was expelled by a peace-officer, there being certain evidence that he was acting under direction of defendant's servants, and, while so acting, used unnecessary violence. *Rose* v. *Railway Co.*, 725.

MORTGAGES AND TRUST-DEEDS.

1. *Purchaser for value. Extending debt. Taking mortgage.*

The abandonment by a creditor of a present right to sue, and the acceptance of a mortgage to secure his debt, payable in the future, constitute him a purchaser for value. *Atkinson* v. *Greaves*, 42.

2. *Property used in trade. Code* 1880, § 1300. *Recorded liens.*

Section 1300, code 1880, providing that personal property used or acquired in the business of a trader, under certain circumstances, shall be treated as his, as against his creditors, has no application against the original seller of such property, who, to secure the purchase-money, reserves title by an instrument signed by the purchaser, and duly acknowledged and recorded. *Tufts* v. *Stone*, 54.

3. *Unlawful detainer. Defense. Failure to pay privilege tax. Code* 1880, § 589.

Where plaintiff, in an action of unlawful detainer, claims by virtue of a sale under a trust-deed, defendant can defeat a recovery by showing that he gave plaintiff the trust-deed to secure a debt contracted with him while he was conducting business as a merchant without having paid a sufficient privilege tax, whereby, under § 589, code 1880, the contract was void; and the defendant in such case need not pay or tender the amount due, as he would be required to do on seeking affirmative relief in equity. *Williams* v. *Simpson*, 113.

4. *Alteration of mortgage. Intent to correct mistake.*

The alteration by the mortgagee of the description of land in a mortgage, without the consent of the mortgagor, will not render the mortgage void, if done without any fraudulent intent but only in the honest effort to correct a mistake and conform it to the true intent. *Foote* v. *Hambrick*, 157.

5. *Partition of personalty. Tenant in common. Trustee. Code* 1880, § 2580.

After condition broken, a trustee in a deed of trust conveying an undivided interest in personalty, has such interest as will entitle him to maintain a suit for partition of the property under § 2580, code 1880, which provides that "any tenant in common of personal property" of less value than $150 may obtain partition thereof before a justice of the peace. *Porter* v. *Stone*, 291.

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6. *Cropper. Abandonment of crop. Advances.*

Where a laborer on shares who, to secure a debt for supplies to be advanced, has given a trust-deed on his share of the crop, abandons the work, and another takes his place, with the consent of the other share-owner and the holder of the trust-deed, and obtains supplies under it, but, after making and partly gathering the crop, also abandons it, the claim of the *cestui que trust* cannot be defeated by the act of such other share-owner. *Ib.*

7. *Action for property converted. Defense.*

An action at law by the trustee in a deed of trust to recover the value of incumbered personal property, which has been purchased and converted, cannot be defended by showing that the debtor has other accessible property, subject to the deed, and sufficient to satisfy the debt secured thereby. *Barlow* v. *Brittain*, 427.

8. *Unlawful detainer. Remedy. Purchaser. Code* 1880, § 2645.

The purchaser of land at trustee's sale, under a trust-deed with power of sale on default, is entitled, as against the grantor, who withholds possession, to maintain the action of unlawful entry and detainer provided by § 2645, code 1880. *Marks* v. *Howard*, 445.

9. *Crops. Description General terms.*

A trust-deed conveying "the entire crops of corn, cotton and other agricultural products to be raised and gathered by the grantor, his family or employes under him, during the year 1891, on any lands cultivated or controlled by the grantor in Clay county, Mississippi," is sufficiently definite in the description of the property. *Russell* v. *Stevens*, 685.

10. *Validity. Crops to be grown. Potential existence.*

Crops to be grown by the grantor, or his employes, during the year, on land of which he is in possession, either as owner or by the consent of the owner, preparatory to making a crop, have such a potential existence as to be a valid subject of mortgage. *Ib.*

11. *Power. Appointment of trustee. Personal trust. Void sale.*

A power conferred on a beneficiary in a trust-deed to appoint a trustee, should the person named die or be unwilling to act, is personal, and cannot be delegated; and where, under such power, an agent of the beneficiary assumes to appoint a trustee, a sale made by him will confer no title, either legal or equitable. *Hartley* v. *O'Brien*, 825.

12. *Future debts. Default. Declaring debt due. Sale.*

Where a trust-deed, given a corporation to secure a debt due in future, contains a stipulation that, on default in payment of interest, the beneficiary may declare the whole debt due, it is not essential that there shall be any formal declaration. Proceeding through its agents, accord-

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ing to its custom, and causing a sale by the trustee, will be deemed an exercise of its right to declare the debt due. *Dunton* v. *Sharpe*, 850.

13. *Trustee's sale. Ministerial acts by others. Approval of trustee.*

The personal attendance by the trustee, at a sale of land under a trust-deed, is not essential. He may act through others in advertising and making the sale. All that is necessary is, that the terms of the trust-deed shall be complied with as to this, and that the trustee shall approve the sale and execute a deed. *Ib.*

14. *Same. Agent of trustee. Bidding for purchaser. Validity of sale.*

The fact that the representative of an absent trustee, who advertises and makes the sale under a trust-deed, is empowered to bid a fixed sum for the purchaser, and does so, will not incapacitate him from making the sale, especially where it appears that, but for this, the land would have sold for less. *Ib.*

15. *Same. Title acquired. Prior purchase at tax-sale.*

Title to land acquired at a trustee's sale will not be affected by the mere fact that, prior to such sale, after default by the grantor in the trust-deed, the purchaser had bought the land at a tax-sale. *Ib.*

16. *Same. Effort to set aside sale. Overflow. Delay.*

A trustee's sale of land, though made at a somewhat reduced price, will not be set aside on the ground that it was made just after a disastrous overflow, and when the debtor, who was poor, had asked for a delay, default under the trust-deed having been made before the overflow, and there being no reason for believing that the sale could have been averted if the overflow had not occurred. *Ib.*

17. *Notice of sale. Acquiescence. Estoppel. Presumption.*

Where the grantor is present at a sale made under a trust-deed, and seeks a postponement thereof, and afterwards endeavors to buy the land from the purchaser, and, failing in this, threatens to contest the sale on specific grounds, never alluding to a failure to give the prescribed notice, in a suit to set aside the sale, brought several years after possession taken thereunder, independently of any presumption arising from the trustee's deed, it will be assumed that notice of the sale was given as required. *Ib.*

18. *Sale in pais. Good faith. Impartiality. Case.*

While holding that the utmost good faith and impartiality must characterize the execution of a power of sale *in pais* under a trust-deed, on the facts of this case, the court refuses to set aside such a sale, without reference to complainant's delay in seeking to vacate it. *Ib.*

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MULTIPLICITY OF SUITS.

See INJUNCTION.

MUNICIPALITIES.

1. *Code* 1892, *chapter* 93. *Acceptance of. Election.*

By § 3035, chapter 93, code 1892, declaring that after the chapter became operative, every municipality should be governed by its provisions, but that any municipality might, within twelve months, "elect not to come under the provisions hereof," power was given municipalities, affirmatively, to accept the provisions of the chapter and be governed thereby. *Jackson* v. *Shlomberg*, 47.

2. *Same. Effort to rescind acceptance ineffectual.*

Its corporate authorities having formally resolved to accept the provisions of the code chapter, the city of Jackson became bound thereby, and subsequent action of the authorities purporting to rescind the resolution of acceptance, though within the twelve months, was ineffectual. *Ib.*

3. *Construction of statutes. "Person." Municipality not embraced, when.*

Generally, where a statute deals primarily with matters foreign to the ordinary functions of public corporations, and imposes burdens or liabilities on persons without any corresponding benefits, the word "person" will not be held to embrace municipal corporations exercising a part of the state's sovereignty. *Dollman* v. *Moore*, 267.

4. *Same. Attachment in chancery. Garnishment. Code* 1880, § 1832. *Case.*

A municipal corporation, or its board of school-trustees, is not a "person" within the meaning of § 1832, code 1880, conferring upon chancery courts jurisdiction of attachment suits against non-resident, absent or absconding debtors and persons in this state, who have in their hands effects of, or are indebted to, such debtors. *Ib.*

5. *Garnishment of. Decree; who may object.*

Where a municipality, against which, as garnishee, a decree has been rendered in an attachment suit in chancery against a non-resident, fails to object that it is not subject to garnishment, the objection, not being jurisdictional, cannot be made by the defendant in attachment on appeal. *Ib.*

6. *Banks; taxation of. Valuation of stock. Laws* 1890, *p.* 9.

In taxing banks, under the act of 1890 (Laws, p. 9), municipalities have the right to levy seventy-five per cent. of the state tax on the value of the capital stock paid in, as shown by the statement required to be fur-

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nished by the bank to the county assessor. In the absence of a showing that the stock is worth more or less, it is to be rated at par. *Alexander* v. *Thomas*, 517.

7. *Duty of municipal authorities. Assessment of bank stock.*

If the board of supervisors, in disregard of the statute, assess the capital stock of a bank at less than its value, on the ground that property generally is so assessed, it is the duty of the municipal authorities to disregard this, and assess the stock at its value. *Ib.*

8. *Code* 1892, § 3035. *Rejection of chapter. Certifying action. Time.*

Under § 3035, chapter 93, of the code, which took effect April 2, 1892, providing that any municipality preferring its existing charter might elect not to come under the code provisions, by resolution of its corporate authorities "entered of record and certified to the secretary of state within twelve months" after the chapter becomes operative, a resolution so adopted (though within the twelve months), but not certified to the secretary of state until afterwards, is ineffectual to prevent the operation of the code chapter as to such municipality. *State* v. *Goran*, 535.

9. *Validity of ordinance. Power. Retailing meats.*

Under a charter giving the right "to regulate the vending of meats brought into the city for sale," and "to license, tax and regulate butchers," a municipality may adopt ordinances to prevent the retailing of fresh meats from 4 o'clock P.M. to 9 A.M., except by persons licensed. *Porter* v. *Water Valley*, 560.

10. *Criminal law. Evidence. Town ordinance. Judicial notice thereof.*

This court will not take judicial notice of town ordinances. Hence, in a prosecution for the violation of an alleged ordinance, a conviction will not be sustained if the evidence fails to show its existence. *Naul* v. *McComb City*, 699.

11. *Subscription to railroad. Breach of contract. Cancellation.*

Under act 1890 (Laws, p. 690), empowering a town, through its officials, to subscribe for the stock of a railroad company and issue bonds in payment, when authorized by a vote, ordered on petition of freeholders, where, in case of an election, there is such a petition, accompanied by a written proposal on the part of the railroad company that its line will be completed within a certain time, such stipulation, though not in the petition of freeholders or the order for the election or notice thereof, becomes a part of the contract, and, on failure to complete the road within the time fixed, the town so subscribing may sue on the bond given by the railroad company as a guaranty that the contract will be complied with, or may have cancellation of its bonds in the hands of the company. *Clark* v. *Rosedale*, 542

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12. *Ultra vires. Extension of time. Varying contract.*

In such case an extension of time to complete the road, granted by the municipal board, is of no validity, because of its want of power to materially vary the contract authorized by the vote. *Ib.*

13. *Ordinance. Violation. Placing goods on sidewalk. Sufficiency of charge.*

Under an ordinance making it unlawful to place any goods on a sidewalk, an affidavit charging defendant with obstructing a sidewalk by allowing barrels to *remain* thereon, without averring that he placed them there, charges no offense. *Giardina* v. *Greenville*, 896.

14. *Same. Strictness. Articles designated. Ejusdem generis.*

An ordinance which prohibits placing on a sidewalk "straw, chips, dirt, shells, tin cans, iron hoops, swill, nails, iron, glass, fruit peelings, melon rinds, shavings, rags, hair or such rubbish," is not violated by allowing *barrels* to remain on the sidewalk, obstructing it. Though they may contain the things mentioned, or have iron hoops and nails in their make-up, barrels are not embraced in the enumeration. *Ib.*

NEGLIGENCE.

1. *Master and servant. Injury to servant. Contributory negligence.*

A servant who fails to use ordinary care in looking out for danger, and, as a consequence, is injured while in the discharge of a hazardous duty, cannot recover therefor on the ground that the master failed to use means to prevent the injury. *Capital Oil Works* v. *Black*, 8.

2. *Same. Alleged negligence of master. Case.*

The president of an oil company ordered out a loaded car, and as it rolled down the side-track he called to several employes present to know if any of them could couple it, when plaintiff, one of the laborers, who had some experience in handling cars, ran ahead of the car to couple it to another, the president urging him on, and at the same time directing another employe, a boy, to put on the brake, which, however, was not done. Plaintiff supposed the speed of the car would be controlled, and did not look back. It ran with force against the other car just as he reached it, injuring his hand. *Held*, that, as he might have seen the danger of the undertaking by looking, he could not recover for the injury. *Ib.*

3. *Railroads. Speed in towns. Code* 1880, § 1047.

Although by § 1047, code 1880, running a train within an incorporated town at a *greater* rate of speed than six miles an hour is *per se* negligence, it does not follow that running at a *less* rate of speed is always lawful. Whether it is negligence or not must be determined by the circumstances of each case. *Railway Co.* v. *Phillips*, 14.

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4. *Railroads. Accident at crossing. Reasonable precautions. Instruction.*

In an action to recover of a railroad company for injuries received in jumping from a vehicle to avoid collision with a moving train at a crossing, it is error to instruct for plaintiff that, in determining whether the engineer did all he should have done to avoid the collision after he saw the vehicle and its danger, the jury might consider certain stated facts which throw no light on that inquiry, but merely tend to show negligence *before* seeing the vehicle. *Ib.*

5. *Same. Fires. Contributory negligence. Master and servant.*

In an action against a railway company to recover the value of a mill destroyed by fire, alleged to have been negligently set out by a locomotive, where it is shown that the employes of the mill were charged with the duty of extinguishing fires, it is not error to instruct that if, after discovering the fire, they could have extinguished it, but failed to use ordinary diligence in doing so, the plaintiff cannot recover. *Home Ins. Co.* v. *Railway Co.*, 119.

6. *Same. Adjacent property. Anticipating negligence. Fires.*

An owner of property adjacent to a railroad, who uses it in a natural and ordinary way for purposes to which it is suited, is not called on to anticipate negligence on the part of the railway company, and his failure to so manage his property as to provide against danger from negligent emission of sparks by passing locomotives, is not contributory negligence. *Ib.*

7. *Risk of adjacent owner. Duty of company. Degree of care.*

On the other hand. in taking the land for the right of way, it is to be assumed that the owner was compensated for the enhanced danger from fire caused by the location of the track. This includes the danger of fires accidentally, but not negligently, set out. Therefore, in an action by such owner for the value of property destroyed by fire through the alleged negligence of the defendant, it is proper to refuse to instruct that the defendant is required to exercise the utmost care to prevent the escape of fire, and that the care should be determined by the situation and condition of plaintiff's property, and the method of conducting his business thereon. *Ib.*

8. *Same. Danger of fire. Duty of company. Use of property.*

The duty of a railroad company is only to run its trains with reference to property along its line providently used by the owners thereof. It is not bound to shut off steam, or otherwise increase precautions while running, because the adjacent property owner carelessly exposes his property to fire. *Ib.*

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9. *Railroads. Fires. Absence of negligence. Duty of company.*

A railroad company is under no duty to contiguous owners to stop its train to extinguish fires which, without its fault or negligence, are set out by the locomotive. *Ib.*

10. *Same. Running trains. Speed. Negligence. Code* 1880, § 1407.

In an action for the value of property destroyed by the alleged negligence of defendant, where there is evidence that the train which set out the fire was running within an incorporated town more than six miles an hour, in violation of § 1407, code 1880, an instruction for defendant is erroneous which assumes to state the duties of defendant under the circumstances, but is silent as to the presumption of negligence arising under said statute from the rate of speed, if found to be excessive. *Ib.*

11. *Same. Killing stock. Instruction.*

In an action against a railroad company for killing a horse on its track, where there is evidence tending to show negligence on the part of the engineer, an instruction is erroneous which declares disjunctively that defendant is not liable if the employes used reasonable care to avoid the injury, or, after seeing the animal, it was impossible to stop the train in time to avoid the injury. The impossibility of stopping after *seeing* the danger could not relieve from previous negligence, if such there was. *Railway Co.* v. *Suddoth*, 265.

12. *Same. Liability to employe prior to constitution* 1890.

In an action against a railroad company, where it is shown that injury was caused to an employe by the negligence of defendant prior to the constitution of 1890, the law then in force governs. By it, the defendant is *prima facie* not liable to the employe for injury suffered in the service for which he was employed. *Railroad Co.* v. *Cathey*, 332.

13. *Same. Connection of negligence with injury.*

The gist of such an action is negligence of the defendant, and that injury to the employe resulted therefrom. It is not sufficient merely to show negligence of the employer, and a possibility that the injury complained of was caused thereby. *Ib.*

14. *Verdict. Unsupported by evidence. Duty to vacate.*

In such case, while maintaining inviolate the right of trial by jury, and adhering to the rule that a verdict will not be disturbed merely because the court differs from the jury in considering the evidence, yet, if after a careful consideration of the evidence for plaintiff, giving it all full credit, the court cannot discover any probable connection between the defendant's negligence and the injury suffered, a verdict for plaintiff will be set aside. *Ib.*

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15. *Railroads. Excessive speed. Injury. Contributory negligence.*

Although a railroad company is *per se* guilty of negligence, and also violates the law in running its train within an incorporated town more than six miles an hour, recovery cannot be had of it for the death of one whose contributory negligence in recklessly exposing himself before the train while so running, was unmistakably the efficient cause of his being struck by the engine and killed. *Crawley* v. *Railroad Co.*, 340.

16. *Same. Killing stock. Evidence. Case.*

Where, in an action against a railroad company for killing a mule, the engineer, the only witness for defendant, testified that, when first disclosed by the head-light, the mule was standing across the track, about fifty yards ahead of his rapidly moving train, and it was then impossible to avoid the accident, and the evidence for plaintiff is merely that the tracks of the mule showed that it had run forty yards down the track before being struck, there is no real conflict in the evidence, and, that of the engineer being probable, the court should have instructed for the defendant. *Railway Co.* v. *Tate*, 348.

17. *Master and servant. Act of servant outside of employment. Damages.*

Where a water company contracts for certain work to be done requiring excavations near its pump-house, and its engineer, as an accommodation for a servant of the contractor, agrees to look after a certain pump of the contractor, but negligently fails to do so, whereby the excavations are flooded from the works of the company, the latter is not liable to the contractor therefor. *Water Co.* v. *Gorman*, 360.

18. *Railroads. Fellow-servant. Engineer and brakeman. Const.* 1890, § 193.

A railroad company is not liable for injury to a brakeman resulting from negligence of the engineer, who, after signaling for brakes, caused a sudden start of the train, while the brakeman was applying the brakes in obedience to the signal. While thus engaged in their routine duties in the operation of the train, the engineer is not "the superior agent or officer," or "person having the right to control or direct the services" of the brakeman, within the meaning of § 193, constitution 1890, regulating the liability of railroad companies for injuries to employes. *Evans* v. *Railway Co.*, 527.

19. *Same. Sick passenger. Negligence. Damages.*

A declaration against a railroad company which alleges that plaintiff's son, being taken seriously ill while from home, was placed on a train of defendant as a passenger, with a ticket, in charge of the conductor, who, with full knowledge of his condition and of the necessity of his speedily reaching home, promised to take care of him, and to assist him from the train if necessary, but that he wholly neglected this; that the youth, while unconscious, was taken past his destination, and was put off in the

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night at a place where there were no accommodations, and where he remained without attention for forty hours, being finally sent home, and that, as the result of the neglect and exposure, he shortly afterwards died, states a good cause of action. *Sevier* v. *Railroad Co.*, 61 Miss., 8, distinguished. *Weightman* v. *Railway Co*, 563.

20. *Inn-keeper. Injury to guest. Contributory negligence.*

The declaration alleged that plaintiff, a guest at a watering-place, occupied a room in a cottage separate from the main hotel, the room being at the end of a gallery five feet high, unprotected by a railing; that on going to supper, it being dark, she left the door open and a light burning, to guide her on returning; that a servant of the hotel closed the door, and, by reason of this, and of the failure by defendants, the proprietors, to provide a railing and lights, plaintiff fell from the gallery and was injured. *Held*, a demurrer to the declaration was properly sustained, since the defendants were under no obligation to provide a railing, and plaintiff was negligent in going on, despite the absence of the light. *Sneed* v. *Moorehead*, 690.

21. *Instruction. Contributory negligence. Question for jury.*

In an action against a railroad company for damage to horses transported, where the question is the alleged contributory negligence of plaintiffs, in failing to feed the horses at a certain station, whereby, it is claimed, they became weak and more subject to injury, it is error to charge, as matter of law, that plaintiffs were not negligent as to this if they were informed by an employe of defendant that the cars containing the horses would not be delayed at such station. In such case, the question of contributory negligence is one of fact for the jury. *Railroad Co.* v. *Mullins*, 730.

NEW TRIAL.

1. *Appeal. Supreme court. Loss of papers by appellee.*

Where an appeal is perfected, on showing by affidavit that a transcript of the record cannot be had because of the loss or destruction of the original papers by appellee's fault, the court will grant a rule on him to show cause why there shall not be a reversal; and, if it appears that the papers have been lost or destroyed, so that the merits cannot be known, the court will reverse, that there may be a new trial. *Quarles* v. *Hiern*, 259.

2. *Verdict. Supported by evidence. When not set aside.*

If a verdict is supported by evidence, and the court cannot say the jury was unwarranted in reaching a conclusion, it will not be disturbed, although a finding for the opposite party would have been more satisfactory to the court. *Railroad Co.* v. *Cantrell*, 329.

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3. *Practice. Usee in action ex delicto. Irregularity.*

An action of damages against a railroad company for killing animals on its track, being *ex delicto*, should not be brought in the name of one for the use of another. And in an action so brought a recovery against the defendant will not be disturbed for want of proof that the usee had an interest in the suit. His connection with the case will be disregarded in passing upon the correctness of the verdict. *Ib.*

4. *Verdict. Unsupported by evidence. Duty to vacate.*

While maintaining inviolate the right of trial by jury, and adhering to the established rule that a verdict will not be disturbed merely because the court differs from the jury in considering the evidence, yet, if after a careful consideration of the evidence for plaintiff, giving it all full credit, the court cannot discover any probable connection between the defendant's negligence and the injury suffered, a verdict for plaintiff will be set aside. *Railroad Co.* v. *Cathey*, 332.

5. *Admonition. Failure of counsel to heed. Code* 1892, § 1741.

In a criminal case, where counsel for the state refers in argument to the failure of the accused to testify, and, being admonished by the court, continues the comment to the extent of stating an alleged reason for it, a new trial will be granted; and this without regard to the character of the comment. *Yarbrough* v. *State*, 593.

6. *Sale. Fraud. Evidence. Verdict unsupported.*

Where a claimant of personal property seized under execution, introduces in evidence a bill of sale from the debtor, executed prior to the date of the judgment, conveying the property to him in part satisfaction of a trust-deed, and the testimony of the claimant and the debtor in support of the transaction is not unreasonable or improbable, and not contradicted by any positive evidence, a judgment for plaintiff should be set aside as unsupported, although the property was found in defendant's possession, and there were circumstances that, unexplained, might have cast a suspicion on the good faith of the sale. *Mitchell* v. *McDaritt*, 608.

7. *Homicide. Admitting incompetent evidence. Error. Not cured.*

When incompetent evidence of great import is deliberately introduced, and it cannot be said with confidence that no other conclusion than that of guilty could have been reached on the legal evidence, the fact that the jury was subsequently instructed to disregard the incompetent testimony, will not cure the error, and for this a new trial will be granted. *Chism* v. *State*, 742.

NOTICE.

1. *Bona fide purchaser. Payment of consideration. Burden of proof.*

Though the defense of a *bona fide* purchaser is affirmative, and must be pleaded and proved by one who relies upon it, proof of payment of the

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consideration is *prima facie* evidence of the want of notice, and devolves upon the opposite party the burden of showing notice. *Atkinson* v. *Greaves*, 42.

2. *Purchase under trust-deed. Title. Case.*

When, to secure a creditor, a surviving husband has given a trust-deed conveying the fee of lands, as to which there is a secret resulting trust in favor of his children, the secured creditor being a *bona fide* incumbrancer, and afterwards the husband goes into bankruptcy, and the land is sold by the trustee and assignee in bankruptcy, acting conjointly under a decree of the bankrupt court, a good title passes, though it is recited in the schedules that the bankrupt had only a life-estate. The purchaser acquires title through the trust-deed, regardless of the recitals in the schedules. *Ib.*

3. *Conditional sale. Undivided interest. Reservation of title. Caveat emptor.*

Where one, having as partner an undivided interest in personal property, sells the same, reserving title to secure payment of the price, the transaction is legitimate, and no record of it is necessary in order to affect with notice purchasers from the vendee. They must beware. *Journey* v. *Priestley*, 584.

4. *Assignment. Notice to agent. Scope of agency.*

A railroad company will be bound by a notice of the assignment of wages by an employe served upon a depot-agent where the latter has been accustomed for many years to receive such notices for the company, and, under orders from his superiors, communicate them to the superintendent. *Railroad Co.* v. *Bryant*, 665.

5. *Vendor and vendee. Bona fide purchaser. Notice to attorney.*

A purchaser of land, having a bond for title, is chargeable with notice of an adverse claim thereto received by his agent or attorney who files for him a bill for specific performance, and who pays the purchase-money, and procures the deed. *Edwards* v. *Hillier*, 803.

6. *Judgment. Attack. Want of notice. Clear proof.*

One alleging want of notice, in attacking a judgment against himself which is apparently valid, must make the clearest and most convincing proof. *Quarles* v. *Hiern*, 891.

7. *Execution sale. Want of proper notice. Bona fide purchaser.*

That at execution sale land is not properly advertised, will not affect the title of a purchaser who has no notice of the irregularity. The fact that the defendant gives a notice at the sale that the *judgment* is void, and that, therefore, the sale will be contested, will not change this. *Ib.*

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8. *Execution sale. Purchase by judgment creditor. Cum onere.*

It is otherwise if the judgment creditor purchases. He is charged with notice of irregularities. *Ib.*

OFFICE AND OFFICER.

1. *Vacancy in office. Justice of the peace. Const.* 1890, § 103.

The mode of filling vacancies in the office of justice of the peace is, by § 103, constitution 1890, committed entirely to the legislature. *State* v. *Lovell*, 309.

2. *Same. Legislative authority. Code* 1892, §§ 3683, 3686.

The office of justice of the peace is a "county *district* office" under § 3683, code 1892. It is not embraced in § 3686, which authorizes the governor to fill, by appointment, any vacancy in a "county office." Therefore, he is not authorized by it to fill by appointment a vacancy in the office of justice of the peace, though the board of supervisors has failed for more than forty days to provide for filling such vacancy by election. *Ib.*

3. *Same. Case of emergency. Const.* 1890, § 103.

But in such case, the local authorities not having filled the vacancy within the time required by law, and the legislature having failed to provide for filling such a vacancy otherwise, a case of emergency arises, authorizing the governor to fill it by provisional appointment, under § 103 of the constitution. *Ib.*

4. *Provisional appointment. Vacancy regularly filled. Code* 1892, § 3683.

In such case, where the unexpired term exceeds two years, the appointment, being provisional, should not be for the unexpired term, but only "until the vacancy is regularly filled;" and it should be filled by special election, as required by § 3683, code 1892. *Ib.*

5. *Appointment pending controversy. Validity. Vacancy.*

Where, to fill a vacancy, an election is held which is irregular, but a commission is issued to the successful candidate, who qualifies and enters upon the duties of the office, and afterwards litigation arises involving the validity of the election, whereupon such person, anticipating an adverse decision, is appointed by the governor as if there had been no election, the fact that this is done pending the controversy does not affect the validity of his appointment. *Ib.*

6. *Vacancy. Duty of executive. Validity of acts. Review by courts.*

Such appointment, pending the controversy, is not an invasion by the executive of the judicial department. Charged with the duty of execut-

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ing the laws and making appointments in proper cases, the governor must decide for himself whether a vacancy exists in a given case, his acts being subject to review by the courts. If he assumes to appoint when there is no vacancy, or when the power to appoint does not exist, it will confer no right. *Ib.*

7. *Process. Execution. Deputy sheriff. Agent of plaintiff.*

A person is not disqualified to act as deputy sheriff in levying an execution because he is agent for plaintiff in collecting the judgment, and is to receive a commission on the collection. It is error to quash a levy because of such fact. *Badley* v. *Ladd*, 688.

OFF-SET.

See SET-OFF.

ORDINANCE.

See MUNICIPALITY.

PARTIES.

Practice. Usee in action ex delicto. Irregularity.

An action of damages against a railroad company for killing animals on its track, being *ex delicto*, should not be brought in the name of one for the use of another. And in an action so brought a recovery against the defendant will not be disturbed for want of proof that the usee had an interest in the suit. His connection with the case will be disregarded in passing upon the correctness of the verdict. *Railroad Co.* v. *Cantrell*, 329.

PARTITION.

1. *Limitation. Bill of review. Code* 1880, §§ 2568, 2681, 2693.

Section 2693, code 1880, denying any action to recover property sold under a chancery decree, after two years from date of possession taken by the purchaser, will not debar a minor interested in lands sold in partition proceeding from filing a bill of review at any time within two years after coming of age. Code 1880, §§ 2568, 2681. Partition proceedings are governed by an independent chapter of the code, to which the general provision in said § 2693 has no application. *Martin* v. *Gilleylen*, 324.

2. *Conflicting claims. Jurisdiction. Code* 1880, § 2576.

Under § 2576, code 1880, the chancery court has jurisdiction in a partition suit to adjudicate all conflicting claims or controversies between those

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properly joined as parties. This is true, even where a defendant, alleged to be a co-tenant, denies that he is such, and asserts an adverse title in himself. *Claughton* v. *Claughton*, 384.

3. *Solicitor's fee. When taxed. Hostile title. Code* 1892, § 3119.

The power conferred by § 3119, code 1892, on the chancery court in partition suits to tax a reasonable fee for the solicitor of complainant should be exercised only where the services of such solicitor were for the common benefit of all the parties. It should not be allowed if there is a real controversy between them, and defendants, in good faith, resist the partition; and where defendants assert a hostile title to a part of the land, it is error, as against them, to tax a fee which includes services in canceling such claim as well as services in the partition. *Neblett* v. *Neblett*, 572.

PARTITION OF PERSONALTY.

Tenant in common. Trustee. Code 1880, § 2580.

After condition broken, a trustee in a deed of trust conveying an undivided interest in personalty, has such interest as will entitle him to maintain a suit for partition of the property under § 2580, code 1880, which provides that "any tenant in common of personal property" of less value than $150 may obtain partition thereof before a justice of the peace. *Porter* v. *Stone*, 291.

PARTITION WALL.

1. *Deed. Contract to build. Stipulation.*

To recite in a deed, as a part of the consideration, that the vendees, or any subsequent owner of the land conveyed, "shall have the right of uniting with and using the south wall which may be erected by us" thereon, is not to stipulate that a wall shall or *will* be built, and the grantors are not liable in damages for failure to erect one. *Money* v. *Peavy*, 260.

2. *Evidence. Writing. Contemporaneous parol agreement.*

Because of the writing, a contemporaneous parol agreement by such grantor to build the wall cannot be shown. *Ib.*

3. *Verbal agreement to build. Code* 1880, § 979.

Section 979, code 1880, authorizing verbal contracts between those "who own adjoining lots" for erecting partition walls, does not apply to contracts whereby parties are negotiating to become such owners. *Ib.*

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PARTNERSHIP.

1. *What constitutes. Sharing net profits. Intent.*

An agreement to share in the net profits of a business is not a conclusive test of a partnership. The intent of the parties, if not inconsistent with the terms of the contract, will control. *Fairly* v. *Nash*, 193.

2. *Same. Case in judgment.*

Nash and Skellinger agreed that Nash should furnish the money and buy goods, and Skellinger should "take charge of the business as agent and manager for Nash, and devote his whole time and attention to it, for which services he should receive half the net profits after paying debts, expenses and advances by Nash." The sign at the store was "W. S. Skellinger, agent for D. A. Nash." *Held*, not a partnership. *Ib.*

3. *Same. Character of contract. Minor stipulations.*

The character of said contract, as creating a mere agency and not a partnership, is not changed by other stipulations in it relating to mere details of management, such as employment of clerks, keeping books, stated accountings and division of profits, and the requirement that such agent shall also divide profits derived from any outside business engaged in by him. *Ib.*

4. *Change to landlord and tenant. Notice to creditors.*

Where the owner of a plantation forms a partnership with another to make a crop thereon, and afterwards, early in the year, the arrangement is changed, the partner becoming a tenant, third persons, dealing with him individually, but who had no dealings with the firm, are not entitled to be specially notified of the change in the relation from that of partners to that of landlord and tenant, though they had knowledge of the partnership while it existed. *Warren* v. *Jones*, 202.

5. *Same. Purchasers. Notice. Misleading instructions.*

In such case, where the third persons who had no dealings with the firm, are sued by the landlord for purchasing from the tenant agricultural products upon which he had a lien, it is proper to refuse instructions which assert that, in order to make defendants liable, it was necessary that they should have had "knowledge or notice" of the change from a partnership to a tenancy. As such instructions might be construed as meaning that it was essential that they should be specially notified, they would be calculated to mislead the jury. *Ib.*

6. *Assignment. Preferring debt to former partner.*

Where there is an actual dissolution of a mercantile firm, one of the partners buying the interest of the other, giving a note therefor, and he afterwards fails and makes an assignment, preferring this debt, creditors

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cannot defeat the assignment on the ground that there was no notice of the withdrawal, and that, therefore, the retiring partner being personally liable to them, it would be a fraud on their rights to permit the assets thus to be devoted to the claim of the retiring partner. *Richardson* v. *Davis*, 219.

7. *Assignment. Debt for money loaned former partner.*

This is true also of a debt for money loaned by the retiring member to his former partner after the withdrawal, it being likewise preferred in the assignment. *Ib.*

8. *Same. Dissolution inter sese. Right of former partner.*

That the retiring partner, by failing to give notice, may have become personally liable for the payment of the debts subsequently contracted in the business, does not make him in fact a partner, and in no way affects the validity of the claims due him or the right of the former partner to prefer them in an assignment of the previous firm assets. *Ib.*

9. *Estate of decedent. Administration in two states. Domicile of assets.*

Where an estate in this state and in Alabama consists in part of decedent's half-interest, as partner in a mercantile firm in this state, and administration is taken out in both states, the balance due to decedent on an accounting of the partnership assets is properly payable to the Mississippi administrator, although deceased lived in Alabama and the accounting was had and money paid in that state. *Jones* v. *Warren*, 227.

10. *Same. Administration in this state. What to embrace. Case.*

Where, on such accounting, the administrator, who is administrator in both states, paid the surviving partner of the Mississippi partnership an account due to it by the deceased partner, and then collected and charged to himself, as administrator in this state, the decedent's half of the partnership assets, thus augmented, he should be allowed in his administration in this state for the account so paid; and this, notwithstanding the account was for supplies furnished for decedent's use in Alabama, and the administrator had sought to obtain credit for the amount in his administration in that state. *Ib.*

11. *Estate of partner. Registration. Limitation. Code* 1880, § 2026.

Said account on the books of the partnership against the deceased partner is not a claim against his estate required to be probated and registered under § 2026, code 1880; nor, before an accounting of the partnership assets, is it subject to the statute of limitations. *Ib.*

12. *Usury. Joint venture. Sharing profits.*

A contract by which complainant is to advance money to publish and introduce defendant's book, and, in consideration thereof, is to be paid his

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advances, with legal interest, out of the net profits, if any, and also one-half of such profits, imposes no personal liability on defendant, and is not usurious. *Duval* v. *Neal*, 288.

13. *Chancery jurisdiction. Partnership interest. Enforcing demand.*

The subject of a conditional sale being an undivided interest in a partnership, the seller, in order to enforce payment of the purchase-money, cannot seize the goods by action at law, and may resort to equity. *Journey* v. *Priestly*, 584.

PENALTIES AND FORFEITURES.

1. *Equity jurisdiction. Enforcing statutory penalties. Full relief.*

While courts of equity refuse to enforce penalties growing out of private contracts, they will, in proper cases, enforce statutory penalties, as where, having jurisdiction for one purpose, the enforcement of such penalties is necessary to full relief. *Lafayette County* v. *Hall*, 678

2. *Same. Treasurer's bond. Reformation. Decree for penalty. Code* 1880, § 375.

Where the chancery court exercises its jurisdiction to reform a general bond of a defaulting county treasurer, and, according to the intent of the parties, decrees that it shall also stand as a bond for school-funds, it should then treat it just as if originally executed as a bond for school-funds, and a decree thereon against the treasurer and his sureties should include the penalty provided for by § 375, code 1880, and be for double the deficit. *Ib.*

3. *Constitutional law.* "*Due process of law.*" *Const.* 1890, § 14.

A legislative act providing for the infliction of a penalty and its collection by summary process, without a judicial proceeding adjudicating the liability, is taking private property without due process of law, and is therefore unconstitutional. *McBride* v. *State*, 716.

PLEADING.

1. *Declaration. Damages. Matters in aggravation.*

Where, in an action for damages, the declaration alleged that defendants, in an attempt to collect a debt, forcibly and against her remonstrance, entered plaintiff's house while she was disrobed, and seized a certain check and demanded of her to indorse it, and took it away, to the damage of plaintiff, etc., the gravamen of the action is the taking of the check, and the other matters are merely in aggravation of damages. *Bonelli* v. *Bowen*, 142.

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2. *Jeofails. Verdict. Insufficient evidence. Pleading. Code* 1892, § 746.

The statute of jeofails cures only defects of *pleading.* Where the facts are made of record by demurrer to evidence, they must show a right of recovery in order to sustain a verdict for plaintiff. If such right does not appear, after verdict it will not avail plaintiff that the declaration, being insufficient, was not demurred to, and that the evidence fully supports the allegations that are made. *Holmes* v. *Preston*, 152.

3. *Trover. Evidence. Description of property.*

While the same particularity of description of the property in trover is not required as formerly, it still is necessary that the *res*, for the conversion of which the action is brought, should be at least generally described in the declaration and identified by the evidence. *Bank* v. *Montgomery*, 550.

4. *Same. Insufficient identification of property. Case.*

In such action, where the declaration alleges the conversion of an entire stock of merchandise, consisting of numerous and different kinds of articles, and the evidence shows the conversion of only a part of the stock, without designation of the quantity, character or class to which the converted articles belong, plaintiffs are not entitled to a verdict, and an instruction for defendant is proper. *Ib.*

5. *Tax-title. Code* 1871, § 1709. *Invoked without being pleaded.*

The curative effect of § 1709, code 1871, as to tax-sales, is always available where the facts make the statute applicable. Unlike a mere statute of limitations, it is not required that it shall be pleaded. It may be invoked on appeal for the first time. *Cole* v. *Coon*, 634

6. *Appearance. Form of plea. Effect. Judgment.*

Where an appellant claims that a plea (which is somewhat ambiguous in form) was intended only as an appearance for a co-defendant, if the plea as filed would have been sufficient to prevent a judgment by default against appellant, it will be treated as an appearance for him, and a judgment for plaintiff based thereon will be sustained. *Solomon* v. *Compress Co.*, 822.

POLICE POWER.

Municipality. Validity of ordinance. Retailing meats.

Under a charter giving the right "to regulate the vending of meats brought into the city for sale," and "to license, tax and regulate butchers," a municipality may adopt ordinances to prevent the retailing of fresh meats from 4 o'clock P.M. to 9 A.M., except by persons licensed. *Porter* v. *Water Valley*, 560.

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POOR, SUPERVISION OF.

1. *Support outside of poor-house. Duty of supervisors.*

In case of a pauper not in a condition to be removed to the poor-house without cruelty, her condition being made known to the supervisor of the district, who, after long delay, examines into her claims for support, and finds that she is in such condition that she should be cared for where she is, instead of being sent to the poor-house, the board of supervisors should allow to the person who has cared for her proper compensation for her support during the period after notice to the supervisor. *Reynolds* v. *Supervisors*, 59 Miss., 132, distinguished. *Rankin County* v. *Watson*, 85.

2. *County. Liability for services to pauper. Emergency. Code* 1880, § 626.

Where no steps have been taken to declare one who is indigent and helpless a pauper, and, owing to his physical condition, he cannot be removed to the poor-house, but requires immediate surgical attention, which is bestowed in the emergency, the county is chargeable therefor. *Lee County* v. *Gilbert*, 791.

POWERS.

1. *Appointment of trustee. Personal trust. Void sale.*

A power conferred on a beneficiary in a trust-deed to appoint a trustee, should the person named die, or be unwilling to act, is personal, and cannot be delegated; and where, under such power, an agent of the beneficiary assumes to appoint a trustee, a sale made by him will confer no title, either legal or equitable. *Hartley* v. *O'Brien*, 825.

2. *Trustee's sale. Ministerial acts by others. Approval of trustee.*

The personal attendance by the trustee, at a sale of land under a trust-deed, is not essential. He may act through others in advertising and making the sale. All that is necessary is that the terms of the trust-deed shall be complied with as to this, and that the trustee shall approve the sale and execute a deed. *Dunton* v. *Sharpe*, 850.

3. *Same. Agent of trustee. Bidding for purchaser. Validity of sale.*

The fact that the representative of an absent trustee, who advertises and makes the sale under a trust-deed, is empowered to bid a fixed sum for the purchaser, and does so, will not incapacitate him, from making the sale, especially where it appears that, but for this, the land would have sold for less. *Ib.*

4. *Same. Sale in pais. Good faith. Impartiality. Case.*

While holding that the utmost good faith and impartiality must characterize the execution of a power of sale *in pais* under a trust-deed, on

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the facts of this case, the court refuses to set aside such a sale, without reference to complainant's delay in seeking to vacate it. *Ib.*

PRACTICE.

1. *Infant. Replevin for property sold. Defense. Estoppel.*

Where one, during infancy, sells personal property, receiving part of the price, and on attaining majority brings replevin for the property, and the suit is defended upon a general denial of his right to the property, it will not avail the defendant to show at the trial that there had been no formal renunciation of the contract of sale before suit. *George* v. *Hewlett*, 1.

2. *Replevin. Demand. General defense. Estoppel.*

Where one is lawfully in possession of personal property, having a charge upon it or the like, a demand by the owner is necessary to perfect his right to maintain replevin; but, when sued, if the defendant stands his ground and contests the right of property in the plaintiff, he cannot afterward change his position and rely upon the want of demand, or other merely preliminary step, as a defense. *Ib.*

3. *Judgment by default. Plea on file. Error.*

A judgment by default, rendered when there is a plea undisposed of which is a full answer to the declaration, will be reversed. *Hambrick* v. *Dent*, 59.

4. *Same. Code* 1880, § 1433. *Applies only to criminal cases.*

Such error is not cured by § 1433, code 1880, which applies only to criminal cases. *Duncan* v. *Supervisors*, 64 Miss., 38, explained. *Ib.*

5. *Inadvertence of counsel. Opportunity to supply evidence.*

The substantial rights of litigants should not be lost by the mere indiscretion of counsel when discovered during the progress of the trial, and application to avoid its effect is promptly made, which, if granted, will result in no delay or injustice to the opposite party. Where, because of failure to make certain proof, a demurrer to evidence is interposed, and plaintiff seasonably applies for leave to make the further proof, it is error to refuse the application and compel a joinder in the demurrer. *Holmes* v. *Preston*, 152.

6. *Erroneous instruction. Modification of; who may complain.*

One who has asked an erroneous instruction cannot assign for error its modification, for, if not content with it as modified, he should have declined to read it to the jury. *Railway Co.* v. *Suddoth*, 265.

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7. *Variance. Failure to object. Waiver.*

Where there was a variance between the declaration and the evidence, no objection being made on that ground, and an amendment would have been allowable, so as to conform the pleadings to the evidence, after verdict for plaintiff, the defendant, on appeal, will be held to have waived the objection, though the variance would have been fatal on timely objection. *Railroad Co.* v. *Cathey*, 332.

8. *Claimant's issue. Appeal to circuit court. New affidavit.*

The fact that a claimant, through mistake, makes affidavit in the justice court, claiming as trustee in a trust-deed, and, after appeal to the circuit court, files an amended affidavit, claiming as agent for the beneficiary, is of no importance and should not operate to his prejudice. *Mitchell* v. *McDavitt*, 608.

9. *Justice court. Suit for material. Act* 1884, *p.* 84. *Filing account.*

Where plaintiff, suing in a justice court for materials furnished, made the affidavit required by act 1884 (Laws, p. 84), and had a writ of seizure and summons issued, it is error for the circuit court, on appeal, to dismiss the suit because the evidence of debt was not filed with the justice until two days after the issuance of the writ. *Bryant* v. *Harris*, 683.

PRESUMPTION.

Husband and wife. Purchase in joint name. Presumption of gift.

Where a husband buys land, taking the title in his wife's name and his own jointly, and afterwards makes improvements thereon, the presumption is of a gift to her of a half-interest in both the land and improvements. *Krippendorf* v. *Wolf*, 81.

PRINCIPAL AND AGENT.

1. *Agreement not a partnership. Case in judgment*

Nash and Skellinger agreed that Nash should furnish the money and buy goods, and Skellinger should "take charge of the business as agent and manager for Nash, and devote his whole time and attention to it, for which services he should receive half the net profits after paying debts, expenses and advances by Nash." The sign at the store was "W. S. Skellinger, agent for D. A. Nash." *Held*, not a partnership. *Fairly* v. *Nash*, 193.

2. *Same. Character of contract. Minor stipulations.*

The character of said contract, as creating a mere agency and not a partnership, is not changed by other stipulations in it, relating to mere de-

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tails of management, such as employment of clerks, keeping books, stated accountings, and division of profits, and the requirement that such agent shall also divide profits derived from any outside business engaged in by him. *Ib.*

3. *Agency. Manager. Power to bind principal by note.*

An agent, having general authority to manage his principal's mercantile business, has, by virtue of his employment, no implied power to bind his principal by making, accepting or indorsing negotiable paper. *Ib.*

4. *Same. Execution of note Principal not bound thereon.*

Although a note executed by such general agent, signed in his name as agent, was for money borrowed to pay debts of the business, transacted by the agent, the principal is not liable in an action *on the note*, whatever may be his liability if sued on the common counts for the money so used. *Ib.*

5. *Agency. As to lands. Contract of sale of personalty. Authority.*

A non-resident banker having an agent in this state to look after his wild land here, with power to negotiate sales thereof, subject to approval, pay taxes, sue for trespass, and otherwise exercise general supervision as to the land, is not bound by a contract made by such agent, in his name, to buy 60,000 staves, and sell them to another. So held, although the contract grew out of a transaction in which the agent had, by replevin, seized 23,000 of the staves as having been cut on the land of his principal, and which the principal had authorized him to sell. *Gilchrist* v. *Pearson*, 351.

6. *Private corporation. May act without seal. Agency.*

In making a sale of its personal property, a private corporation may act without seal. Agency for the corporation in such case may be proved, and authority to act for it implied, as in case of natural persons. *Carey Lumber Co* v. *Cain*, 628.

7. *Same. Bill of sale. Authority of manager. Parol evidence.*

It is not essential to the validity of a bill of sale of the personal property of a private corporation that it should be under seal. And parol evidence is admissible to show the authority of an agent or manager to execute such an instrument. *Ib.*

8. *Assignment. Notice to agent. Scope of agency.*

A railroad company will be bound by a notice of the assignment of wages by an employe served upon a depot-agent, where the latter has been accustomed for many years to receive such notices for the company, and, under orders from his superiors, communicate them to the superintendent. *Railroad Co.* v. *Bryant*, 665.

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9. *Vendor and vendee. Bona fide purchaser. Notice to attorney.*

A purchaser of land, having a bond for title, is chargeable with notice of an adverse claim thereto received by his agent or attorney who files for him a bill for specific performance, and who pays the purchase-money and procures the deed. *Edwards* v. *Hillier*, 803.

PRINCIPAL AND SURETY.

1. *Replevin. Property destroyed by fire. Liability of sureties.*

In replevin for property wrongfully taken or withheld, where the defendant gives bond for its forthcoming, the plaintiff, on recovering, is entitled to judgment against the obligors on the bond for the value of the property, though, without their fault, it is destroyed by fire after the execution of the bond. *Whitfield* v. *Whitfield*, 44 Miss., 254, overruled. *George* v. *Hewlett*, 1; *McPherson* v. *Lumber Co.*, 649.

2. *Letter of guaranty. Debts to be created. Acceptance.*

One who writes to another that he will be responsible for advances to be made in reasonable amounts to his tenants, is entitled to notice, within a reasonable time, that the offered guaranty is accepted. If it is not given, he will not be bound thereon. *Ellis* v. *Jones*, 60.

3. *Guardian's bond. Surety. Release. Past delinquencies. Unauthorized loan.*

As the obligation of a guardian's bond is that the estate of the wards shall be lawfully managed and delivered to them on the termination of the guardianship, a surety thereon, although released by decree of court from further liability, remains liable for loss which results from a prior unauthorized loan of the wards' money. *Bell* v. *Rudolph*, 234.

4. *Same. Surety not discharged. Case.*

Such surety is not discharged by the fact that the guardian, after making the unauthorized loan of money to her insolvent husband, and its use by him in his business, gives a new bond with the husband as co-guardian, and thereafter in their accounts, they charge themselves with the sum loaned as money on hand. *Ib.*

5. *Same. Decree on accounting. Effect on surety. Payment.*

Nor is such surety released by the decrees of the court approving such subsequent accounts of the guardian. Nothing but payment can discharge the obligation. *Ib.*

6. *Action on bond. Limitation. When time begins to run.*

The duty of the guardian to account to the wards is part of the obligation of his bond. Accordingly, before a final accounting by the guardian,

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the statute of limitations does not run in favor of a surety as against the wards. *Ib.*

7. *Release of surety. Building contract. Anticipating payments.*

A stipulation in a building contract that payments shall be in fixed installments, the last when the house is completed, is a security for the execution of the contract which inures to a surety of the contractor, and, to the extent that the surety is deprived thereof by the owner's act in anticipating payments, he is discharged. *Picard* v. *Shantz*, 381.

PRIVATE CORPORATION.

See CORPORATIONS.

PRIVILEGE TAX.

1. *Unlawful detainer. Defense. Failure to pay privilege tax. Code* 1880, § 589.

Where plaintiff, in an action of unlawful detainer, claims by virtue of a sale under a trust-deed, defendant can defeat a recovery by showing that he gave plaintiff the trust-deed to secure a debt contracted with him while he was conducting business as a merchant without having paid a sufficient privilege tax, whereby, under § 589, code 1880, the contract was void; and the defendant in such case need not pay or tender the amount due, as he would be required to do on seeking affirmative relief in equity. *Williams* v. *Simpson*, 113.

2. *Bank. Act of* 1888. *Exemption from taxation.*

Under the revenue act of 1888 (Laws, p. 16) a bank that failed to pay a *sufficient* privilege tax, measured by its capital stock and assets, was not entitled to exemption from other taxes—state, county and municipal. *Bank* v. *Oxford*, 504.

3. *Same. Taxation. Payment of insufficient privilege. Code* 1880, § 498.

Accordingly, where a bank failed to pay a sufficient privilege tax under the said act of 1888, its capital stock remained liable to taxation as provided by § 498, code 1880. *Ib.*

4. *Failure to pay. Relief against. Act of* 1892.

Where a bank did not pay sufficient privilege tax under the act of 1888 its consequent failure to secure exemption from all other taxes cannot be relieved against by availing of the act of 1892 (Laws, p. 31), granting relief on certain terms to those delinquent as to privilege taxes. The latter act relates only to the enforceability of contracts made by such delinquents. *Ib.*

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5. *Action therefor. Code* 1892, § 3408.

Section 3408, chapter 1081, code 1892, authorizing suits for the recovery of delinquent privilege taxes, applies only to privilege taxes proper, as provided for by said chapter, and not to licenses to retail intoxicating liquors. *State* v. *Fragiacomo*, 799.

PROCESS.

1. *Execution. Deputy sheriff. Agent of plaintiff.*

A person is not disqualified to act as deputy sheriff in levying an execution because he is agent for plaintiff in collecting the judgment, and is to receive a commission on the collection. It is error to quash a levy because of such fact. *Badley* v. *Ladd*, 688.

2. *Justice court. Notice to defendant. Emergency. Code* 1880, § 2194.

Under § 2194, code 1880, when the plaintiff or defendant in a justice court is a non-resident or transient person, and it is made to appear by affidavit that a delay of the trial until the regular term would be of material injury, the justice may have the parties summoned to appear at any "reasonable time," to be named by him, and give judgment. *Goodbar* v. *Owen*, 840.

PUBLIC OFFICER.

See OFFICE AND OFFICER.

RAILROADS.

1. *Speed in towns. Code* 1880, § 1047. *Negligence.*

Although by § 1047, code 1880, running a train within an incorporated town at a *greater* rate of speed than six miles an hour is *per se* negligence, it does not follow that running at a *less* rate of speed is always lawful. Whether it is negligence or not must be determined by the circumstances of each case. *Railway Co.* v. *Phillips*, 14.

2. *Accident at crossing. Reasonable precautions. Instruction.*

In an action to recover of a railroad company for injuries received in jumping from a vehicle to avoid collision with a moving train at a crossing, it is error to instruct for plaintiff that, in determining whether the engineer did all he should have done to avoid the collision after he saw the vehicle and its danger, the jury might consider certain stated facts which throw no light on that inquiry, but merely tend to show negligence *before* seeing the vehicle. *Ib.*

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3. *Injury to employe. Unsafe appliance. Const.* 1890, § 193.

Section 193, constitution 1890, which provides that "knowledge by any employe injured of the defective or unsafe character or condition of any machinery, ways or appliance, shall be no defense to an action for injury caused thereby, except," etc., abolishes the defense of contributory negligence in such actions, unless the negligence of such employe be wilful or reckless. *Welsh* v. *Railway Co.*, 20.

4. *Same. Wilful negligence of employe. Question of fact.*

Where, in such case, the employe testified that he had seen that the appliance causing the injury was defective, but had reported it and believed, or had reason to believe, it had been remedied, it was for the jury to say whether he was wilfully or recklessly negligent in his use of it. *Ib.*

5. *Fires. Contributory negligence. Master and servant.*

In an action against a railway company to recover the value of a mill destroyed by fire, alleged to have been negligently set out by a locomotive, where it is shown that the employes of the mill were charged with the duty of extinguishing fires, it is not error to instruct that if, after discovering the fire, they could have extinguished it, but failed to use ordinary diligence in doing so, the plaintiff cannot recover. *Home Insurance Co.* v. *Railway Co.*, 119.

6. *Same. Adjacent property. Anticipating negligence. Fires.*

An owner of property adjacent to a railroad, who uses it in a natural and ordinary way for purposes to which it is suited, is not called on to anticipate negligence on the part of the railway company, and his failure to so manage his property as to provide against danger from negligent emission of sparks by passing locomotives, is not contributory negligence. *Ib.*

7. *Danger of fire. Use of adjacent property. Right of owner.*

Accordingly, it is error to refuse to instruct that a person owning property contiguous to a railroad has a right to continue to use the property after the railroad has been built *in the same manner as before*, if he takes reasonable care to prevent or extinguish fires. *Ib.*

8. *Risk of adjacent owner. Duty of company. Degree of care.*

On the other hand, in taking the land for the right of way, it is to be assumed that the owner was compensated for the enhanced danger from fire caused by the location of the track. This includes the danger of fires accidentally, but not negligently, set out. Therefore, in an action by such owner for the value of property destroyed by fire through the alleged negligence of the defendant, it is proper to refuse to instruct that the defendant is required to exercise the utmost care to prevent the escape of fire, and that the care should be determined by the situation

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and condition of plaintiff's property, and the method of conducting his business thereon. *Ib.*

9. *Danger of fire. Duty of company. Use of property.*

The duty of a railroad company is only to run its trains with reference to property along its line providently used by the owners thereof. It is not bound to shut off steam, or otherwise increase precautions while running, because the adjacent property owner carelessly exposes his property to fire. *Ib.*

10. *Fires. Absence of negligence. Duty of company.*

A railroad company is under no duty to contiguous owners to stop its train to extinguish fires which, without its fault or negligence, are set out by the locomotive. *Ib.*

11. *Running trains. Speed. Negligence. Code* 1880, § 1407.

In an action for the value of property destroyed by the alleged negligence of defendant, where there is evidence that the train which set out the fire was running within an incorporated town more than six miles an hour, in violation of § 1407, code 1880, an instruction for defendant is erroneous which assumes to state the duties of defendant under the circumstances, but is silent as to the presumption of negligence arising under said statute from the rate of speed, if found to be excessive. *Ib.*

12. *Same. Fires. Definition of negligence. Instruction.*

In an action involving the alleged negligence of a railroad company in emitting sparks and burning adjacent property, the giving of an instruction defining negligence, which, in effect, declares that the company's servants are required only to act with regard to known circumstances, and ignores the fact that not knowing may itself be negligence, will not cause a reversal where the record discloses no material circumstances unknown to such servants, which it is their duty to know and act upon in managing the locomotive. *Ib.*

13. *Killing stock. Negligence. Instruction.*

In an action against a railroad company for killing a horse on its track, where there is evidence tending to show negligence on the part of the engineer, an instruction is erroneous which declares disjunctively that defendant is not liable if the employes used reasonable care to avoid the injury, or, after seeing the animal, it was impossible to stop the train in time to avoid the injury. The impossibility of stopping after *seeing* the danger could not relieve from previous negligence, if such there was. *Railway Co.* v. *Suddoth*, 265.

14. *Practice. Usee in action ex delicto. Irregularity.*

An action of damages against a railroad company for killing animals on its track, being *ex delicto*, should not be brought in the name of one for

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the use of another. And in an action so brought a recovery against the defendant will not be disturbed for want of proof that the usee had an interest in the suit. His connection with the case will be disregarded in passing upon the correctness of the verdict. *Railroad Co.* v. *Cantrell*, 329.

15. *Liability to employe prior to constitution* 1890. *Negligence.*

In an action against a railroad company, where it is shown that injury was caused to an employe by the negligence of defendant, prior to the constitution of 1890, the law then in force governs. By it, the defendant is *prima facie* not liable to the employe for injury suffered in the service for which he was employed. *Railroad Co.* v. *Cathey*, 332.

16. *Same. Negligence. Connection with injury.*

The gist of such an action is negligence of the defendant, and that injury to the employe resulted therefrom. It is not sufficient merely to show negligence of the employer, and a possibility that the injury complained of was caused thereby. *Ib.*

17. *Excessive speed. Injury. Contributory negligence.*

Although a railroad company is *per se* guilty of negligence, and also violates the law in running its train within an incorporated town more than six miles an hour, recovery cannot be had of it for the death of one whose contributory negligence, in recklessly exposing himself before the train while so running, was unmistakably the efficient cause of his being struck by the engine and killed. *Crawley* v. *Railroad Co.*, 340.

18. *Killing stock. Negligence. Case.*

Where, in an action against a railroad company for killing a mule, the engineer, the only witness for defendant, testifies that, when first disclosed by the head-light, the mule was standing across the track, about fifty yards ahead of his rapidly moving train, and it was then impossible to avoid the accident, and the evidence for plaintiff is merely that the tracks of the mule show that it had run forty yards down the track before being struck, there is no real conflict in the evidence, and, that of the engineer being probable, the court should instruct for the defendant. *Railway Co.* v. *Tate*, 348.

19. *Shipment of live-stock. Transportation of shipper.*

A stipulation in the bill of lading of live-stock that the shipper designated in it may accompany the stock on the freight-train free of charge can be availed of only by him. Another, though assisting the shipper and claiming an interest in the stock, who, without procuring a ticket or tendering his fare, also boards the train with the shipper, intending to ride free, does not thereby become a passenger. *Railroad Co.* v. *Burnsed*, 437.

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20. *Trespasser on train. Injury to. Case.*

And if, soon after boarding the train, a collision is imminent, and, to avoid danger, such person leaps from the train, and is injured, he will not be held to have acquired the rights of a passenger, merely because he had entered the caboose with the shipper, without objection by the conductor, who merely expressed surprise that he also was going, it appearing that the conductor was busily occupied, and, up to the time of the accident, had not demanded his fare, or seen the bill of lading, or learned of such purpose to claim free passage under it. *Ib.*

21. *Same. Injury to trespasser. Liability for.*

In the absence of wantonness or wilfulness on the part of the servants of a railroad company, it is not liable for injury to trespassers, whether in its trains or on its track. *Ib.*

22. *Fast train. Foreign passengers. Custom to stop.*

Though one knows that a certain fast passenger-train, as a rule, does not stop at the station of his residence in this state, yet, if there is a custom for such train to stop there for the accommodation of passengers holding tickets purchased from connecting railways in other states, he may avail himself of this custom by purchasing such a ticket in another state, and making a contract for transportation to said station on said fast train. *Humphries* v. *Railroad Co.*, 453.

23. *Same. Special contract. Breach. Recovery. Peremptory instruction.*

In a suit against the railroad company for failure to stop for plaintiff to get off at said station, he having purchased such a ticket in another state, it is error to instruct for defendant. There being evidence tending to support his contention, it should be left to the jury to say whether plaintiff had a special contract to be carried to said station on that train, and whether there was such custom—a fixed habit, known to the traveling public—to stop for debarkation of foreign travelers. *Ib.*

24. *Fellow-servant. Const.* 1890, § 193. *Fireman, telegraph operator.*

A fireman on the locomotive and a telegraph operator at one of the company's stations are engaged in different departments of labor, or "about a different piece of work," within the meaning of § 193, constitution 1890, and the railroad company is liable for the injury to or death of the fireman by a collision, resulting from the negligence of the operator. *Railroad Co.* v. *Hunter*, 471.

25. *Same. Const.* 1890, § 193. *Injuries causing death. Who may sue.*

For injuries to an employe resulting in death, an action against a railroad company, based on § 193, constitution 1890, as to fellow-servants, must be brought by "the legal or personal representative"—that is, by the executor or administrator of the decedent. *Ib.*

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26. *Negligence. Fellow-servant. Engineer and brakeman. Const.* 1890, § 193.

A railroad company is not liable for injury to a brakeman resulting from negligence of the engineer, who, after signaling for brakes, caused a sudden start of the train, while the brakeman was applying the brakes in obedience to the signal. While thus engaged in their routine duties in the operation of the train, the engineer is not "the superior agent or officer," or "person having the right to control or direct the services" of the brakeman, within the meaning of § 193, constitution 1890, regulating the liability of railroad companies for injuries to employes. *Evans* v. *Railway Co*, 527.

27. *Subscription to railroad. Breach of contract. Cancellation.*

Under act 1890 (Laws, p. 690), empowering a town, through its officials, to subscribe for the stock of a railroad company, and issue bonds in payment, when authorized by a vote, ordered on petition of freeholders, where, in case of an election, there is such a petition, accompanied by a written proposal on the part of the railroad company that its line will be completed within a certain time, such stipulation, though not in the petition of freeholders or the order for the election or notice thereof, becomes a part of the contract, and, on failure to complete the road within the time fixed, the town so subscribing may sue on the bond given by the railroad company as a guaranty that the contract will be complied with, or may have cancellation of its bonds in the hands of the company. *Clark* v. *Rosedale*, 542.

28. *Ultra vires. Extension of time. Varying contract.*

In such case an extension of time to complete the road, granted by the municipal board, is of no validity, because of its want of power to materially vary the contract authorized by the vote. *Ib.*

29. *Carrier. Sick passenger. Negligence. Damages.*

A declaration against a railroad company which alleges that plaintiff's son, being taken seriously ill while from home, was placed on a train of defendant as a passenger, with a ticket, in charge of the conductor, who, with full knowledge of his condition and of the necessity of his speedily reaching home, promised to take care of him, and to assist him from the train if necessary, but that he wholly neglected this; that the youth, while unconscious, was taken past his destination, and was put off in the night at a place where there was no accommodations, and where he remained without attention for forty hours, being finally sent home, and that, as the result of the neglect and exposure, he shortly afterwards died, states a good cause of action. *Sevier* v. *Railroad Co.*, 61 Miss., 8, distinguished. *Weightman* v. *Railway Co.*, 563.

30. *Waiting-room. Expulsion of passenger. Master and servant.*

Where plaintiff, a colored woman, sues a railroad company for damages for being wrongfully and violently ejected from the waiting-room for

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whites, an instruction is erroneous that announces non-liability, merely if plaintiff was expelled by a peace-officer, there being certain evidence that he was acting under direction of defendant's servants, and, while so acting, used unnecessary violence. *Rose* v. *Railway Co.*, 725.

31. *Ejecting passenger. Manner of expulsion. Instruction.*

It is likewise error to instruct that if plaintiff entered and occupied the waiting-room set apart for whites she cannot recover, if a separate and suitable waiting-room was provided for colored people, since this instruction ignores the ground of complaint that she was ejected in a violent and improper manner. *Ib.*

32. *Same. Separate waiting-rooms. Convenience.*

There being evidence that the waiting-room for colored people was more than one hundred yards from the station proper, an instruction that denies the right of plaintiff, a colored woman, to enter the waiting-room for whites, if there was a "suitable or comfortable" waiting-room for colored people, is objectionable as ignoring the question of distance. *Ib.*

33. *Instruction. Contributory negligence. Question for jury.*

In an action against a railroad company for damage to horses transported, where the question is the alleged contributory negligence of plaintiffs, in failing to feed the horses at a certain station, whereby, it is claimed, they became weak and more subject to injury, it is error to charge, as matter of law, that plaintiffs were not negligent as to this, if they were informed by an employe of defendant that the cars containing the horses would not be delayed at such station. In such case, the question of contributory negligence is one of fact for the jury. *Railroad Co.* v. *Mullins*, 730.

RECEIVER.

Appointment. Notice. Decree. Case.

Execution creditors of a newspaper publishing company, having levied on its presses and outfit, filed a bill against it and certain claimants under trust-deeds who had bonded the property, alleging that defendants were conspiring to hinder and delay complainants until the debts secured should mature, and the property could be sold, and bought in by claimants; that the immediate appointment of a receiver was necessary to prevent this, and to subject the income of the property. *Held*, that the appointment of a receiver, without notice, and before process served, was erroneous, since any wrongful disposition could have been prevented by injunction; and, further, that a decree, authorizing the receiver to continue publication of the newspaper, was too broad. *Meridian News Co.* v. *Diem*, 695.

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RECORD.

Void conviction. Jury of eleven. Record. Parol evidence.

Where the record of a conviction in the circuit court recites that the accused was tried by a jury, whose names are given, and only eleven names appear, the conviction is void, and parol evidence is inadmissible to show that the trial was by twelve men, and that by a clerical error the name of one was omitted. *Scott* v. *State*, 247.

REDEMPTION.

See TAX-TITLE.

REFORMATION.

Treasurer's bond. Reformation. Decree for penalty. Code 1880, § 375.

Where the chancery court exercises its jurisdiction to reform a general bond of a defaulting county treasurer, and, according to the intent of the parties, decrees that it shall also stand as a bond for school-funds, it should then treat it just as if originally executed as a bond for school-funds, and a decree thereon against the treasurer and his sureties should include the penalty provided for by § 375, code 1880, and be for double the deficit. *Lafayette County* v. *Hall*, 678.

REGISTRATION OF DEEDS.

Personal property. Contract reserving title. Code 1880, § 1293.

Where personal property is delivered to a purchaser, the title being reserved by the seller as security for the price, under a written contract, signed and acknowledged by the purchaser, such contract is recordable as a "reservation or limitation of a use or property, by way of condition, reversion or remainder, or otherwise, in goods or chattels, the possession of which remains in another." *Tufts* v. *Stone*, 54.

RELEASE.

See COMPROMISE.

REMOVAL OF CAUSES.

Jurisdiction. Waiver. Federal question.

A citizen of Tennessee brought two suits in the court below against appellant, the Phœnix Insurance Company, a citizen of Connecticut, one on

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a policy for $3,000, and the other on a policy for $2,000. At the return-term defendant pleaded to the merits in both cases, and they were continued. Afterwards, during the term, defendant presented a petition and bond in each case to remove the same to the federal court. In each petition it was averred that the "amount involved is $2,000." No action was taken on the petitions, and afterwards defendant filed other pleas. At the next term, on defendant's motion, the cases were consolidated, and defendant, by leave, withdrew its pleas and petitions for removal, and filed a new petition and bond to remove the case, as consolidated, to the federal court. Removal was denied. *Held*, in the absence of an authoritative decision by the supreme court of the United States on the federal question involved, as matter of policy rather than conviction, in view of the history of the case, that the action of the court in refusing the removal would not be disturbed. *Insurance Co.* v. *Summerfield*, 827.

RENTS.

Mistake as to boundary. Occupancy. Estoppel.

When defendant in ejectment occupies to a certain line, the plaintiff acquiescing therein under the belief that it is the true boundary, on discovering that he has title to land beyond this line, he is not estopped by such acquiescence from recovering rents of the defendant for his occupancy of the same. *Archer* v. *Helm*, 874.

REPEAL.

Constitution 1890. *Local law. Laws* 1886, *p.* 820.

Section 90, constitution 1890, which directs that certain matters shall only be provided for by general laws, and, among other things, declares that the legislature shall not pass local laws "exempting any person from jury, road or other civil duty (and no person shall be exempted therefrom by force of any local or private law)," does not merely prohibit enacting such laws in future, but repeals existing local laws containing the inhibited exemptions. The act of 1886 (Laws, p. 820), exempting members of Scranton Fire Company from road duty, was repealed thereby. *Chidsey* v. *Scranton*, 449.

REPLEVIN.

1. *Infant. Replevin for property sold. Defense. Estoppel.*

Where one, during infancy, sells personal property, receiving part of the price, and on attaining majority brings replevin for the property, and the suit is defended upon a general denial of his right to the property,

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it will not avail the defendant to show at the trial that there had been no formal renunciation of the contract of sale before suit. *George* v. *Hewlett*, 1.

2. *Infant. Placing in statu quo. Practice. Estoppel.*

Nor can the defendant, after such general denial of plaintiff's right, rely upon the defense that he had advanced, for the minor, money to pay certain storage charges on the property, and that plaintiff had failed to pay or tender him the amount before suit. *Ib.*

3. *Demand. General defense. Estoppel. Practice.*

Where one is lawfully in possession of personal property, having a charge upon it or the like, a demand by the owner is necessary to perfect his right to maintain replevin; but, when sued, if the defendant stands his ground, and contests the right of property in the plaintiff, he cannot afterward change his position and rely upon the want of demand, or other merely preliminary step, as a defense. *Ib.*

4. *Same. Property destroyed by fire. Liability of sureties.*

In replevin for property wrongfully taken or withheld, where the defendant gives bond for its forthcoming, the plaintiff, on recovering, is entitled to judgment against the obligors on the bond for the value of the property, though, without their fault, it is destroyed by fire after the execution of the bond. *Whitfield* v. *Whitfield*, 44 Miss., 254, overruled. *Ib.; McPherson* v. *Lumber Co.*, 649.

5. *Evidence. Declarations against interest.*

In an action to recover personal property, it is error to exclude testimony for plaintiff that the person, since deceased, under whom defendant claims title, had stated, before defendant's claim arose, that the property was not his, but plaintiff's. *Walker* v. *Marseilles*, 283.

6. *Conditional sale. Title reserved. Assignment of debt. Replevin by seller.*

Where the seller of personal property has reserved title to secure the purchase-money, evidenced by notes, he may, after default, bring replevin for the property, notwithstanding he has indorsed the notes, and suits are pending thereon against the vendee by the indorsees. The seller can enforce the security, but he will hold the property or proceeds in trust for the owners of the notes. The court has ample power to protect the defendant from being compelled to pay twice. *McPherson* v. *Lumber Co.*, 649.

7. *Forthcoming bond. Destruction of property.*

It is no defense in replevin that the property in controversy, without fault of defendant, who had given bond therefor, was burned while in his possession. *Ib.; George* v. *Hewlett*, 1.

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RES JUDICATA.

Plea. Former suit. Defect. Decree not on merits.

To a bill by the Natchez, Jackson & Columbus Railroad Company, to enjoin the collection of taxes, exemption from which it claims under its charter and other legislation, a plea of *res judicata* is bad that is founded upon a decree sustaining a demurrer to a similar bill filed by the Louisville, New Orleans & Texas Railway Company, claiming, under its purchase of the Natchez, Jackson & Columbus Railroad Company, the benefit of said exemption from taxation, it appearing from the plea that the affidavit as to the payment of the amount of taxes in the construction of the railroad required to secure the exemption, contained no reference to the Natchez, Jackson & Columbus Railroad, and that the bill in that case was therefore fatally defective. *Railroad Co.* v. *Lambert*, 779.

REVENUE AGENT.

See STATE REVENUE AGENT.

REVIVOR.

Execution. Death of defendant. Code 1880, § 1744.

Where, before issuance of execution, one of several judgment defendants dies, a sale of his property thereunder, without previous revivor against the heirs is void. *Faison* v. *Johnson*, 214.

REWARD.

Arrest. Fleeing felon. Code 1880, § 3035.

Where one who has killed another is arrested in open day, on a highway, while going into the town of his residence, being near the business part of it, he declaring at the time that he is on the way to surrender, the arrest is not made while he is "fleeing, or attempting to flee," within the meaning of § 3035, code 1880, and no reward can be allowed therefor. *Oktibbeha County* v. *Cottrell*, 117.

RULES OF SUPREME COURT.

See BEGINNING OF THIS VOLUME.

SALE.

1. *Title reserved. Part payment. Right of seller.*

The seller of personal property, who reserves title until the purchase-money is paid, may, at any time after default and before payment in

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full, retake the property. In such case, he will not hold it absolutely, but merely as security for the amount due. *Tufts* v. *Stone*, 54.

2. *Record. Contract reserving title. Code* 1880, § 1293.

Where personal property is delivered to a purchaser, the title being reserved by the seller as security for the price, under a written contract, signed and acknowledged by the purchaser, such contract is recordable as a "reservation or limitation of a use or property, by way of condition, reversion or remainder, or otherwise, in goods or chattels, the possession of which remains in another." *Ib.*

3. *Same. Property used in trade. Code* 1880, § 1300. *Recorded liens.*

Section 1300, code 1880, providing that personal property used or acquired in the business of a trader, under certain circumstances, shall be treated as his, as against his creditors, has no application against the original seller of such property, who, to secure the purchase-money, reserves title by an instrument signed by the purchaser, duly acknowledged and recorded. *Ib.*

4. *Conditional sale. Undivided interest. Reservation of title. Notice.*

Where one, having as partner an undivided interest in personal property, sells the same, reserving title to secure payment of the price, the transaction is legitimate, and no record of it is necessary in order to affect with notice purchasers from the vendee. They must beware. *Journey* v. *Priestly*, 584.

5. *Reservation of title. Agreement to give note. Purchaser.*

Under an agreement by which the purchaser of personal property is to settle promptly, on receipt of bill of lading, by note or draft payable in four months, or in cash within ten days, at an agreed discount, there is no reservation of title in the seller, and, although the terms be not complied with, the title passes by delivery, and the seller cannot maintain replevin for the property as against one who has bought from the purchaser. *Bank* v. *Cook Carriage Co.*, 587.

6. *Same. Fraud of buyer. Title. Bona fide purchaser.*

Although the purchaser improperly, or even fraudulently, obtained such property, not intending to pay for it or to execute his note as agreed, one who buys the property from him in the usual course of trade, without notice, and before any steps are taken by the original owner to reclaim it, acquires a perfect title. *Ib.*

7. *Fraud. Evidence. Verdict unsupported.*

Where a claimant of personal property seized under execution, introduces in evidence a bill of sale from the debtor, executed prior to the date of the judgment, conveying the property to him in part satisfaction of a

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trust-deed, and the testimony of the claimant and the debtor in support of the transaction is not unreasonable or improbable, and not contradicted by any positive evidence, a judgment for plaintiff should be set aside as unsupported, although the property was found in defendant's possession, and there were circumstances that, unexplained, might have cast a suspicion on the good faith of the sale. *Mitchell* v. *McDavitt*, 608.

8. *Good faith. Agreement to reconvey. Rights of other creditors.*

Where a sale is made in good faith to pay or secure a creditor, the fact that there is an understanding that the property is to be reconveyed when the debt is paid will not invalidate the sale; nor will the fact that the purchaser knows there are other creditors, and is anxious to close the transaction before they can interfere. So held as against attaching creditors in this case, where an absolute bill of sale was given, which was not recorded, the purchaser, however, taking immediate possession. *Carey Lumber Co.* v. *Cain*, 628.

9. *Conditional sale. Title reserved. Assignment of debt. Replevin by seller.*

Where the seller of personal property has reserved title to secure the purchase-money, evidenced by notes, he may, after default, bring replevin for the property, notwithstanding he has indorsed the notes, and suits are pending thereon against the vendee by the indorsees. The seller can enforce the security, but he will hold the property or proceeds in trust for the owners of the notes. The court has ample power to protect the defendant from being compelled to pay twice. *McPherson* v. *Lumber Co.*, 649.

SALE OF LIQUORS.

See LIQUORS, SALE OF.

SCHOOLS.

1. *Constitution* 1869. *Free school-system. Other schools. Taxation.*

Under § 1, art. 8, const. 1869, requiring the legislature to establish "a uniform system of free public schools," while the legislature may not authorize a diversion of the common school-fund, it may empower local authorities to provide schools outside the established system, and to pay therefor by taxation. *Otken* v. *Lamkin*, 56 Miss., 758, distinguished. *Chrisman* v. *Brookhaven*, 477.

2. *Same. Local taxation. Equality and uniformity.*

Local taxation to pay bonds issued for the establishment of such schools is not violative of § 20, art. 12, constitution 1869, requiring taxation to be equal and uniform. *Ib.*

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3. *Legislative power. Separate schools for whites. Const.* 1869, § 21, *art.* 1.

A legislative provision for the establishment, by a municipality, of separate schools for whites and blacks, and the issuance of bonds therefor, is not violative of § 21, art. 1, const. 1869, of this state, which provides that "no public money or moneys shall be appropriated for any charitable or other public institution in this state making any distinction among the citizens thereof: *provided*, that nothing herein contained shall be so construed as to prevent the legislature from appropriating the school-fund in accordance with the article in this constitution relating to public schools." *Ib.*

SEAL.

1. *Private corporation. May act without seal. Agency.*

In making a sale of its personal property, a private corporation may act without seal. Agency for the corporation in such case may be proved, and authority to act for it implied, as in case of natural persons. *Carey Lumber Co.* v. *Cain*, 628.

2. *Code* 1880, § 993, *abolishing. Not retroactive.*

Section 993, code 1880, abolishing all distinctions between sealed and unsealed instruments, except as to corporations, was not retroactive. It does not affect conveyances executed prior to the adoption of said code, either as to the rights conferred by them or the remedies on them. *Gibbs* v. *McGuire*, 646.

3. *Same. Title in ejectment. Unsealed deed. Lex rei situs.*

Accordingly, an unsealed deed, executed prior to the code of 1880, did not convey the legal title, and cannot now be relied on as evidence of title by a plaintiff in ejectment. That the deed was executed in another state, where seals were not required, makes no difference. The *lex rei situs* controls. *Ib.*

SERVANT.

See MASTER AND SERVANT.

SET-OFF.

1. *Former transaction. Money recoverable on common counts.*

If the plaintiff has in his hands money which the defendant is entitled to recover by an action for money had and received, though by reason of former transactions, defendant is entitled to plead set-off. *Wilkinson* v. *Searles*, 392.

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2. *Character of debt set off. Former transactions.*

In an action for the price of a car-load of meal, defendant may assert as a set-off a claim he has against plaintiff, because of inferior quality and short weights in corn and oats formerly purchased from plaintiff and paid for. *Ib.*

3. *Suit against administrator. Estate. Application of assets.*

In an action at law against an administratrix on notes executed by the intestate (her husband), where the defendant proves the delivery to plaintiffs of cotton raised by deceased sufficient to pay the notes, plaintiffs cannot meet this by proof that they had an unprobated account against deceased, the amount not stated, and also an account against his widow and children contracted after his death, and that by consent of the widow and children (one of whom was a minor) the cotton had been received in settlement of these accounts, leaving the notes unpaid. *Hyman* v. *Rollins*, 412.

4. *Same. Right of infant distributee. Power of court of law.*

Whatever the right of plaintiffs against the widow and adult distributees, or what would have been the result if plaintiffs had offered to show that they had received the cotton in satisfaction of a valid debt against the *estate*, is not decided. Because of the interest of the infant in the estate, which cannot be protected in such a case in a court of law, the agreement to apply the cotton belonging to it to a debt due by the widow and adult distributees, leaving the notes a charge on the estate, cannot be enforced. *Ib.*

5. *Chancery court. Judgment. Assignment.*

Where, pending an action, defendant therein recovers a judgment against plaintiff, the latter, after recovering his judgment, cannot maintain a bill in chancery to compel the setting off the two judgments, if, before such recovery by plaintiff, defendant had assigned his judgment. ***Holly*** v. *Cook*, 590.

6. *Judgments. Assignment. Notice. Code* 1880, § 1124.

In such case, it is immaterial that, when plaintiff recovered his judgment, he had no notice of such assignment by defendant. Section 1124, code 1880, providing for the assertion of off-sets and other defenses against notes and other writings for the payment of money, had prior to notice of their assignment, has no application to judgments. *Ib.*

SHERIFF.

Process. Execution. Deputy. Agent of plaintiff.

A person is not disqualified to act as deputy sheriff in levying an execution because he is agent for plaintiff in collecting the judgment, and is

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to receive a commission on the collection. It is error to quash a levy because of such fact. *Badley* v. *Ladd*, 688.

SPECIFIC PERFORMANCE.

Chancery court. Contract to convey. Limitation. Doing equity.

Although defendants, whose ancestor contracted to convey land upon payment of the contract price, are barred by lapse of time from recovering either the land or the price from the purchaser who entered under his contract, the representative of such purchaser who relies on the bar of the statute of limitations, cannot invoke the aid of equity to cancel defendant's claim to the land, unless he offers to pay the balance of the purchase-money and interest. Such a suit, though in form one to cancel clouds, is one for specific performance, which will not be decreed unless complainant offers to perform his part of the contract. *Nolan* v. *Snodgrass*, 794.

STATE REVENUE AGENT.

1. *Repeal of statute. Laws* 1890, *p.* 25. *Code* 1892, *ch.* 126.

The act of 1890 (Laws, p. 25), providing for the collection of delinquent revenue by the state revenue agent, was repealed by the adoption of chapter 126, code 1892, relating to the same general subject. *State* v. *Hill*, 106.

2. *Suit by, abated. Repealed statute. Code* 1892, *ch.* 126.

Said chapter 126, code 1892, does not authorize the state revenue agent to sue an assessor for taxes lost because of his failure to assess the same, and a pending suit, brought by him under the act of 1890, to recover taxes so lost, was abated April 2, 1892, upon the adoption of the code chapter which repealed said act. *Ib.*

3. *Same. Code* 1892, § 4; *effect of. Suit under repealed statute.*

Such pending suit was not saved by § 4, code 1892, declaring that the repeal of any statute by the code provisions should not affect any suit commenced, etc., because this section, though adopted as a part of the code April 2, did not take effect until November 1, 1892. *Ib.*

4. *Appointment of revenue agent. His powers.*

While the constitution provides for various state and county officers, and makes no mention of state revenue agent, it is competent for the legislature to provide for the selection of such officer, and to arm him with the power to bring any action which the state or any of its political subdivisions could bring. *Ib.*

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5. *Code* 1892. *Validity. Adoption. Chapter* 126.

Chapter 126, code 1892, relative to state revenue agent, was lawfully adopted as part of the code. *Ib.; Hunt* v. *Wright*, 298.

6. *Assessment by. Code* 1892, *ch.* 126. *Constitutionality.*

Chapter 126, code 1892, in so far as it provides that the state revenue agent may assess for *ad valorem* taxes property within this state that has escaped taxation, and may collect the taxes thereon, is a departure from the constitutional scheme of securing uniform and equal taxation through assessment by local assessors in each county, and is therefore unconstitutional. *State* v. *Tonella*, 701.

7. *Unlawful retailing. Action for penalty. Code* 1892, § 1590.

The state revenue agent cannot maintain an action for the penalties prescribed by said § 1590, code 1892, against persons unlawfully selling or giving away liquors. The section itself confers the right of action only on the state, county or town, and chapter 126 of said code, entitled "State Revenue Agent," confers on him a right of action only against fiscal officers and against persons owing unpaid taxes, and the penalty prescribed is not a tax. *McBride* v. *State*, 716.

8. *Liquor license. Action therefor. Code* 1892, § 1590.

Under the code of 1892, no action can be brought against one retailing intoxicating liquors without license, except as provided by § 1590 imposing penalties of $500 recoverable by the state, county and city, respectively. A suit by the state revenue agent, to recover the license tax which such retailer should have paid, is not maintainable. *State* v. *Fragiacomo*, 799.

9. *Privilege taxes. Action therefor. Code* 1892, § 3408.

Section 3408, chapter 108, code 1892, authorizing suits for the recovery of delinquent privilege taxes, applies only to privilege taxes proper, as provided for by said chapter, and not to licenses to retail intoxicating liquors. *Ib.*

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTES CONSTRUED.

1. Laws 1870, p. 255. Charter of Mobile & North-western Railroad Co. Exemption from taxation. *Railroad Co.* v. *Lambert*, 779.

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2. Laws 1870, p. 327. Natchez & Jackson Railroad Co. Exemption from taxation. *Railroad Co.* v. *Lambert*, 779.
3. Laws 1872, p. 65. Exemption from taxation. Property used in manufactures. Mississippi Mills. *State* v. *Simmons*, 485.
4. Laws 1877, p. 109. Assessment for taxes. Special act for Monroe county. Failure to return roll. *Pearce* v. *Perkins*, 276.
5. Laws 1878, p. 233. Natchez, Jackson & Columbus Railroad Co. Exemption from taxation. *Railroad Co.* v. *Lambert*, 779.
6. Laws 1882, p. 84. Exemption from taxation. Property used in manufactures. *State* v. *Simmons*, 485.
7. Laws 1884, p. 29. Exemptions from taxation. Repeal of. *Railroad Co.* v. *Lambert*, 779.
8. Laws 1884, p. 76. Damages in attachment. Finality of verdict. Constitutionality. *Mack* v. *Jacobs*, 429.
9. Laws 1884, p. 84. Suit for material. Writ of seizure. Filing account. *Bryant* v. *Harris*, 683.
10. Laws 1884, p. 751. Municipal ordinance. Police power. Vending meats. *Porter* v. *Water Valley*, 560.
11. Laws 1886, p. 12. Privilege tax on banks. Exemption from other taxes. Insufficient payment. *Bank* v. *Oxford*, 504.
12. Laws 1886, p. 35. Sale of liquors. Local option. Alcohol. Malt liquors. Receiving orders. Result of election. Evidence. *Lemly* v. *State*, 241; *Boswell* v. *State*, 395; *West* v. *State*, 598; *Conrad* v. *State*, 733.
13. Laws 1886, p. 35. Rate of interest. Usury. Building and loan associations. *Sullivan* v. *Building & Loan Association*, 94.
14. Laws 1886, p. 820. Scranton Fire Co. Exemption from road duty. Constitutionality. *Chidsey* v. *Scranton*, 449.
15. Laws 1888, p. 16. Privilege tax on banks. Insufficient payment. Exemption from other taxes. *Bank* v. *Oxford*, 504.
16. Laws 1890, p. 6. Taxation. Natchez, Jackson & Columbus Railroad Co. *Railroad Co.* v. *Lambert*, 779.
17. Laws 1890, p. 9. Tax on banks. Limit of municipal tax. Statement to assessor. *Alexander* v. *Thomas*, 517.
18. Laws 1890, p. 25. State revenue agent. Right to sue. Act repealed by code 1892. *State* v. *Hill*, 106.
19. Laws 1890, p. 69. Enticing away laborer. Indictment. Cropper. *Ward* v. *State*, 245.
20. Laws 1890, p. 71. Intoxicating liquors. Sale by agent. Soliciting orders. *West* v. *State*, 598.
21. Laws 1890, p. 376. Brookhaven; amendment to charter of. Bonds for school purposes. *Chrisman* v. *Brookhaven*, 477.
22. Laws 1890, p. 675. Authorizing Natchez, Jackson & Columbus Railroad Co. to consolidate, etc. Immunities preserved. *Railroad Co.* v. *Lambert*, 779.
23. Laws 1890, p. 690. Rosedale & Mississippi Valley Railroad Co.; charter of. Municipal bonds. *Clark* v. *Rosedale*, 542.

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24. Laws 1892, p. 31. Relief from penalties for non-payment of privilege tax. *Bank* v. *Oxford*, 504.
25. Laws 1892, p. 60. Adopting and enforcing code 1892. Constitutionality. *Hunt* v. *Wright*, 298.
26. Laws 1892, p. 362. Coahoma county; division of. Assessment-rolls. Approval and changes. *Investment Co.* v. *Suddoth*, 416.

And see CODE 1871, CODE 1880, CODE 1892.

STOCK LAWS.

1. *Mandamus. Fence between counties. Code* 1892, § 2061.

Mandamus lies to compel a board of supervisors to perform the duty imposed by § 2061, code 1892, as to jointly building and maintaining a fence on or near the county line, to prevent stock straying from a county in which the stock law has not been adopted into an adjoining county where it is in force. *Leflore County* v. *State*, 769.

2. *Same. Petition. Sufficiency of allegation.*

In a petition for mandamus, at the instance of a county that has adopted the law, to compel an adjoining county to join in building a line fence, it is not essential that it should be distinctly alleged that the adjoining county has not adopted the law. As the law is not in force in any county until adopted, the petition will be sufficient as to this, if it avers that a fence between the two counties is necessary, to prevent stock straying from the adjoining county into the county adopting the law. *Ib.*

3. *Counties Fences between. Legislative control.*

It is within legislative control to provide for a joint fence between counties under the stock law. The benefits are mutual, and it cannot be said that a burden is unwarrantably imposed on the county declining to act. In our arrangement of counties, each must be allowed to act in such matters, and the inconvenience, if any, resulting from contiguity of territory, affords no ground for legal complaint. *Ib.*

4. *Same. Validity of the law. Practical difficulties. Not anticipated.*

It is not a valid objection to the law that practical difficulties exist in reference to the location of the fence and procuring the site for it. It will be time enough to deal with these if encountered. They will not be anticipated. *Ib.*

5. *Electors. Constitutional qualifications; not applicable.*

The provisions of the constitution and the election ordinance as to registration and qualification of electors have no application to elections under the stock law. The legislature has plenary power over the subject. *Ib.*

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6. *Joint fence. Manner of raising funds. Code* 1892, § 2062.

In a proceeding by mandamus, at the instance of a county which has adopted the law, to compel an adjoining county, which has not done so, to unite in erecting a line of fence, consideration of § 2062, code 1892, as to the manner of raising money to build and maintain the fence, is not involved. *Ib.*

7. *Same. Obligation on both counties. Refusal of one. Right of the other.*

The fact that one county, after refusal by the other to do its part, proceeds alone, and makes provision for erecting the fence, will not relieve the other county from its obligation. If one county refuses to co-operate, the other may build the fence and recover half the expense. The law charges each with half the expense, and there is no way to escape it. *Ib.*

SUBROGATION.

Chancery pleading. Affirmative defense. Cross-bill.

Where there is an unauthorized sale of land, and the purchaser pays off an incumbrance thereon, the extent of his right, if any, is subrogation to the claim of the incumbrancer, but, on a bill to cancel his claim, the right to subrogation, being affirmative, must be asserted by cross-bill. *Edwards* v. *Hillier*, 803.

SUMMONS.

See PROCESS.

SUNDAY.

Telegraph message. Failure to transmit. Code 1880, § 2949.

A telegraph company accepting for transmission on Sunday, and receiving pay for sending, a message which requests the presence of a lawyer whose services are urgently required in a criminal case, is liable in damages for a failure seasonably to transmit and deliver it. That the transaction is violative of the Sunday law, § 2949, code 1880, is no defense. *Telegraph Co.* v. *McLaurin*, 26.

SUPREME COURT.

1. *Appeal. Error of jurisdiction. Const.* 1890, § 147.

An appeal from a decree enjoining for multiplicity disconnected actions of trespass, brought against the same defendant by different persons injured by the same negligent act, is not governed by § 147, const. 1890, prohibiting a reversal because of error as to whether the cause was of equity or common law jurisdiction, the question being merely as to the power in any court to join such parties in one suit. *Tribette* v. *Railroad Co.*, 182.

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2. *Appeal. Loss of papers by appellee. New trial.*

Where an appeal is perfected, on showing by affidavit that a transcript of the record cannot be had because of the loss or destruction of the original papers by appellee's fault, the court will grant a rule on him to show cause why there shall not be a reversal; and, if it appears that the papers have been lost or destroyed, so that the merits cannot be known, the court will reverse, that there may be a new trial. *Quarles* v. *Hiern*, 259.

3. *Same. Const.* 1890, § 147. *Inability to reverse.*

Under § 147 of the constitution, which forbids the reversal of any judgment or decree on the ground of a want of jurisdiction arising from error as to whether the cause is of equity or common law jurisdiction, if the chancery court, though erroneously, assumes jurisdiction of an action of trespass, the supreme court is powerless to interfere. *Cazeneuve* v. *Curell*, 521.

4. *Same. Const.* 1890, § 147. *Not confined to final decrees.*

This restriction upon the power of the supreme court to reverse is not confined to final judgments or decrees, but applies also to appeals from interlocutory orders or decrees where the question of jurisdiction is directly raised. *Ib.*

5. *Federal question. United States supreme court. Decisions authoritative.*

This court will consider authoritative the decisions of the supreme court of the United States on a federal question. *Overton* v. *Vicksburg*, 558.

6. *Motion to vacate decree. Correct result.*

Where, on a bill to vacate a decree for partition and recover certain land, a decree in favor of complainant is reversed by the supreme court and the bill dismissed, on the ground that she is estopped by having received the proceeds of sale of part of the land allotted to her, and afterwards, though it is made to appear that certain receipts, showing payment of such proceeds to her, were improperly in the record, a motion to vacate the decree of reversal will be overruled, if the court is of opinion, from the record, without considering the receipts, that complainant did receive the proceeds of sale, and is not entitled to relief. *Young* v. *Walker*, 813.

SURETY.

See PRINCIPAL AND SURETY.

TAXATION.

1. *Local taxation. Equality and uniformity.*

Local taxation to pay bonds issued for the establishment of separate schools outside the established free school-system, is not violative of § 20,

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art. 12, constitution 1869, requiring taxation to be equal and uniform. *Chrisman* v. *Brookhaven*, 477.

2. *Mandamus. Assessment. Property escaping taxation. Code* 1880, §§ 486, 509, 513.

Section 486, code 1880, requires the assessor to assess property that has escaped taxation in former years. Section 509 authorizes him to add property to the roll after returning it to the board of supervisors, and before final action thereon. After that, by § 513, the *collector* is required to assess all property left unassessed. Under these provisions it is the duty of the assessor, at any time, to assess property that has escaped taxation for former years. This he may be compelled to do by mandamus, and it is immaterial that when the suit is brought the time has passed for him to make assessments for the current year. *State* v. *Simmons*, 485.

3. *Exemption from taxation. Charter strictly construed.*

The words of a charter are to be considered rather as those of the incorporators than of the state. Exemptions from taxation must be found in the language employed, construed most favorably to the state. An exemption not clearly given, or existing by necessary inference, cannot be allowed. *Ib.*

4. *Same. Provision in charter not a contract. Taxation of capital stock.*

A provision in the charter of a corporation that the "real and personal property of said company shall be subject to the same taxes, and to be assessed and collected in the same way that the real and personal property of individual citizens is assessed and taxed, and not otherwise," cannot be construed as a contract that the capital stock of the corporation will never be taxed. *Ib.*

5. *Taxation of corporation. Value of capital stock. Code* 1880, § 498.

In assessing a corporation for former years in which it has escaped taxation, under § 498, code 1880, the par value of the capital stock is not controlling. The same is to be assessed "at its market value." Accrued profits, the franchise, real and personal property and other factors affecting the value of the stock, are to be considered. The assessment being made *nunc pro tunc*, the subject and the burden are to be considered just as they would have been if the assessments had been made at the proper time. *Ib.*

6. *Same. Taxes paid on property. Deduction therefor. Code* 1880, § 498.

The Mississippi Mills, an incorporated company under the laws of this state, is within the terms of § 498, code 1880, which provides for taxing the capital stock of any "bank or other joint-stock company;" and unpaid taxes on its stock for former years are collectible, notwithstanding the fact that it has paid taxes on its real and personal property for such

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years; but the value of the property so paid on is to be deducted from the valuation of the capital stock. If the value of the property paid on was duly ascertained, it is conclusive. *Ib.*

7. *Property exempted. Valuation of stock reduced. Laws* 1872, *p.* 65; 1882, *p.* 84.

Although it is the capital stock, not the property as such, of the corporation that is taxable, if it was embraced by the act of 1872 (Laws, p. 65), or the act of 1882 (Laws, p. 84), exempting from taxation certain property used in manufactures, effect will be given to said acts by allowing the corporation, in paying back taxes, to deduct the value of the property so exempted from the value of its capital stock. *Ib.*

8. *Equality of taxation. Restricting words of statute. Construction.*

Unless plainly expressing a different purpose, a statute will be construed as intended to levy a single tax upon property, though the words of the law would naturally bear a broader meaning. The courts will, as far as possible, without doing violence to the language used, restrain the meaning of a statute apparently authorizing double taxation. *Ib.*

9. *Taxation of stock. Domestic corporation. Share-holders not taxable.*

Under our statutes a domestic corporation is taxable with the value of its capital stock, and individuals are not taxed on the shares of such stock held by them. *Ib.*

10. *Bank. Privilege tax. Act of* 1888. *Exemption from taxation.*

Under the revenue act of 1888 (Laws p. 16), a bank that failed to pay a *sufficient* privilege tax, measured by its capital stock and assets, was not entitled to exemption from other taxes—state, county and municipal. *Bank* v. *Oxford*, 504.

11. *Taxation of banks. Code* 1880, § 498. *Repeal. Acts of* 1886, 1888.

Neither the revenue act of 1886 (Laws, p. 12), imposing a privilege tax on banks, nor the revenue act of 1888 (Laws, p. 16), providing that payment of the privilege tax therein imposed should exempt from all other taxes, abrogated § 498, code 1880, which provided for taxing, at its market value, the capital stock of banks. Said section remained in full force, inoperative if the act of 1888 was complied with, but operative if it was not. *Ib.*

12. *Bank. Payment of insufficient privilege. Code* 1880, § 498.

Accordingly, where a bank failed to pay a sufficient privilege tax under the said act of 1888, its capital stock remained liable to taxation as provided by § 498, code 1880. *Ib.*

13. *Banking corporation. Taxation of shares. Code* 1880, § 498.

Under § 498, code 1880, and all former codes in this state, the property and assets of banks and other joint-stock companies are not taxable as those

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of individuals. They are not required to report to the assessor indebtedness due them, money on hand or on deposit, or other assets, but only the value of the shares of capital stock paid in. Thus, through the corporation as a medium, such shares are taxed, and an individual shareholder is not required to give in his shares of stock for separate taxation. *Ib.*

14. *Taxation of capital stock. Non-taxable securities. No deduction therefor.*

Shares of the capital stock in a bank are taxed through the bank, regardless of how the capital is invested. Hence, a bank in reporting its capital stock for taxation must give it in at its market value, and cannot deduct therefrom the amount of its capital or assets invested in non-taxable securities. *Ib.*

15. *Municipality. Banks; taxation of. Valuation of stock. Laws* 1890, *p.* 9.

In taxing banks, under the act of 1890 (Laws, p. 9), municipalities have the right to levy seventy-five per cent. of the state tax on the value of the capital stock paid in, as shown by the statement required to be furnished by the bank to the county assessor. In the absence of a showing that the stock is worth more or less, it is to be rated at par. *Alexander* v. *Thomas*, 517.

16. *Same. Duty of municipal authorities. Assessment.*

If the board of supervisors, in disregard of the statute, assess the capital stock of a bank at less than its value, on the ground that property generally is so assessed, it is the duty of the municipal authorities to disregard this, and assess the stock at its value. *Ib.*

17. *Domestic insurance company. Const.* 1890, § 181.

Under § 181, constitution 1890, domestic insurance companies are protected against an aggregation of taxes, whether state, county, or municipal, in excess of the tax required of foreign insurance companies doing business in this state, until their assets become sufficient to yield an *ad valorem* tax, which, added to the privilege tax, will exceed the tax required of such foreign companies. *Brennan* v. *Insurance Co.*, 531.

18. *Constitutional law. Exemption from taxation. Const.* 1890, § 112.

The provision of § 112, constitution 1890, that no county shall be denied the right to levy county or special taxes upon certain assessments, applies only to assessments of railroad or other like property not situated wholly in one county. With the exception of this provision, there is no limitation in the constitution on the power of the legislature to exempt property from taxation by counties, cities, towns, or villages. *Ib.*

19. *Interstate commerce. License tax. Citizen of another state.*

A city ordinance imposing a license tax on transient peddlers, so far as it applies to a non-resident traveling agent selling goods by sample for a

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corporation in another state, though the goods are sent to him for delivery, is void as an attempt to regulate interstate commerce. *Asher* v. *Texas*, 128 U. S., 129, followed. *Overton* v. *Vicksburg*, 558.

20. *Assessment for taxation. Who may make. Legislative power.*

Assessment for taxation can only be made by the officer designated by law; and where the constitution devolves the duty of assessing upon a certain officer, the legislature cannot substitute another. *State* v. *Tonella*, 701.

21. *Revenue agent. Assessment by. Code* 1892, *ch.* 126. *Constitutionality.*

Chapter 126, code 1892, in so far as it provides that the state revenue agent may assess for *ad valorem* taxes property within this state that has escaped taxation, and may collect the taxes thereon, is a departure from the constitutional scheme of securing uniform and equal taxation through assessment by local assessors in each county, and is therefore unconstitutional. *Ib.*

22. *Exemption from taxation. Legislative power. Mobile & North-western Railroad. Charter.*

Section 21 of the act of July 20, 1870 (Laws, p. 255), incorporating the Mobile & North-western Railroad Company, providing that all taxes to which it might be subject for thirty years should be applied to payment for constructing the road or debts incurred therefor, unless its annual net earnings should exceed eight per cent., and that the affidavit of the president or cashier that such application had been made, should be accepted by tax-collectors in lieu of money for such taxes, was, in effect, an exemption from taxation upon the conditions named, and this exemption the legislature had the power to confer, but not to make irrepealable. *Railroad Co.* v. *Lambert*, 779.

23. *Same. Natchez, Jackson & Columbus Railroad Company. Acts* 1878 *and* 1890.

By the acts of August 8, 1870 (Laws, p. 327), and March 5, 1878 (Laws, p. 233), the immunity from taxation conferred by said section was extended to and confirmed in the Natchez, Jackson & Columbus Railroad Company, and, while it was revoked by the code of 1880, it was restored by the act of March 12, 1884 (Laws, p. 29), and by the revenue act of 1890 (Laws, p. 6), this exemption was again recognized. *Ib.*

24. *Same. Consolidation. Louisville, New Orleans & Texas Railroad Company. Exemption. How secured. Act* 1890.

The said Natchez, Jackson & Columbus Railroad Company was authorized, by the act of February 19, 1890 (Laws, p. 675), "to sell absolutely all or any part of its railroad and other property, . . together with all franchises, powers and immunities;" and, by the second section of said act, was authorized to consolidate with the Louisville, New Orleans &

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Texas Railroad Company, under the latter name. *Held*, the latter company, by its purchase or consolidation, acquired the franchises, rights, powers, privileges and immunities each company had before, and the affidavit required to secure exemption from taxation on what was the Natchez, Jackson & Columbus Railroad could be made by the corresponding officer of the consolidated company. *Ib.*

25. *Exemption. How lost. Provision of original charter.*

Upon such purchase or consolidation, the remote contingency on which the said exemption from taxation should be lost, namely, if the earnings should exceed eight per cent., was intended by the legislature either to be waived by the state or to become applicable whenever the annual earnings of the Natchez, Jackson & Columbus Railroad Company, as a component part of the Louisville, New Orleans & Texas Railroad Company, should amount to eight per cent. *Ib.*

26. *Yazoo & Mississippi Valley Railroad Company. Exemption from taxation.*

After consolidation of the Louisville, New Orleans & Texas Railway Company with the Yazoo & Mississippi Valley Railroad Company, the latter company succeeded to the said immunity from taxation on that part of its lines which formerly comprised the Natchez, Jackson & Columbus Railroad. *Ib.*

27. *Exemption from taxation. Vested rights. Const.* 1890, § 181.

Said exemption from taxation is not affected by § 181, constitution 1890, declaring that the property of all corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, for that section expressly provides that exemptions from taxation then existing should remain in force for the time fixed by charter or the general laws, unless sooner repealed by the legislature. *Ib.*

TAX-COLLECTOR.

Fees of. Delinquent taxes. Code 1892, § 2021.

Section 2021, code 1892, authorizing tax-collectors to receive "ten per centum on all taxes collected after the fifteenth day of December by distress or otherwise," does not provide a penalty on the delinquent tax-payer, but compensation to the tax-collector for services. The words "or otherwise," following the word distress, must be considered as *ejusdem generis*. Hence the collector is not entitled to such compensation, even after December 15, where the taxes are paid or tendered before a resort by him to distress or some of the other statutory modes for enforcing payment of delinquent taxes. *Anderson* v. *Hawks*, 639.

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TAX-TITLE.

1. *Who may acquire. Obligation to pay the taxes.*

A creditor who has previously charged the account of his debtor with the taxes due on the latter's land, and has come under obligation to pay them, cannot acquire a tax-title at the sale for such taxes. *Faison* v. *Johnson*, 214.

2. *Assessment. Failure to return roll. Act of* 1887. *Case.*

A special act for Monroe county (Laws 1877, p. 103) required the land assessment-roll to be returned on the first Monday in July, 1877. At the August term the minutes of the board of supervisors recited that, on account of sickness, the assessor was not present with the roll, and directed notice to be given that the matter of examining it be postponed until the first Monday in September. On the eighth day of the September term the minutes recited that the roll was presented. *Held*, that the roll was not returned at the time required by law, and a sale for taxes based thereon is void. *Pearce* v. *Perkins*, 276.

3. *Tax-deed. Description. Uncertainty. Reference to roll.*

A patent ambiguity in the description of land in a tax-deed made in 1875 cannot be aided by reference to the assessment-roll, if the deed itself contains no such reference. The mention of the reputed owner's name in the deed is not such a reference in aid of the description. *Ib.*

4. *Same. Insufficient description. Case.*

Accordingly, a tax-collector's deed, made in 1875, which describes land thus: "owner's name, C. Dowd, bal. sec. 8, T. 12, R. 17," and the deed from the state as, "bal. sec. 8, T. 12, R. 17," are void for uncertainty of description, and cannot be aided by reference to the assessment-roll. *Ib.*

5. *Three years possession. Wild land. Code* 1880, § 539.

In order to entitle a purchaser at tax-sale to the benefit of the statute of limitations prescribed by § 539, code 1880, "the actual occupation for three years, after one year from the day of sale," must be of at least a part of the land, and must be continuous for three years. *Ib.*

6. *Void description. Lapse of time. Code* 1871, § 1709.

Section 1709, code 1871, which prohibits suits to invalidate tax-titles after three years from the time of sale, does not apply where the tax-deed is void for uncertainty of description. *Ib.*

7. *List of lands. Certificate. Code* 1871, § 1698.

Under § 1698, code 1871, requiring a tax-collector to file with the chancery clerk a list of lands sold for taxes, "certified under his hand to be correct," which shall be in lieu of conveyances, it is sufficient that a list be

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filed, subscribed by the tax-collector, though omitting to state that it is a *correct* list. *Cole* v. *Coon*, 634.

8. *Code* 1871, § 1709. *Lapse of three years. Irregularity.*

Under § 1709, code 1871, where more than three years elapsed after a sale of land for taxes, any mere irregularity, as an excessive levy, cannot be made available to defeat the tax-title. *Ib.*

9. *Same. Code* 1871, § 1709. *Invoked without being pleaded.*

The curative effect of § 1709, code 1871, as to tax-sales, is always available where the facts make the statute applicable. Unlike a mere statute of limitations, it is not required that it shall be pleaded. It may be invoked on appeal for the first time. *Ib.*

10. *Chancery pleading. Code* 1880, § 539. *Bar. Averments of answer.*

An answer, filed in 1891, averring that defendants acquired a tax-title to the land in controversy in 1878, "and have been in possession for more than three years from the date of said deed," does not sufficiently set up the bar provided by § 539, code 1880, in that it fails to show that defendants have occupied the land for the time required since the code of 1880 (which is prospective) went into effect. *Cochran* v. *Richberger*, 843.

11. *Three years possession. Code* 1880, § 539. *No bar, if land redeemed.*

Possession under a tax-title for the time required by § 539, code 1880, which provides that "actual occupation for three years, after one year from the day of sale, of any land held under a conveyance by a tax-collector, in pursuance of a sale for taxes, shall bar any suit to recover such land or assail such title *because of any defect in the sale of such land for taxes, or in any precedent step to said sale*," will not bar the owner where, within the time allowed, there was a redemption, this being a matter occurring *after* the sale. *Ib.*

TELEGRAPH COMPANIES.

1. *Sunday message. Failure to transmit. Code* 1880, § 2949.

A telegraph company accepting for transmission on Sunday, and receiving pay for sending, a message which requests the presence of a lawyer whose services are urgently required in a criminal case, is liable in damages for a failure seasonably to transmit and deliver it. That the transaction is violative of the Sunday law, § 2949, code 1880, is no defense. *Telegraph Co.* v. *McLaurin*, 26.

2. *Same. Recovery by sendee. Damages.*

In such a case the *sendee* may sue, and is entitled to recover the statutory penalty, and also, as damages, the fee he would have earned had the

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message been seasonably delivered, the nature and urgency of the message appearing on its face. *Ib.*

3. *Master and servant. Trespass. Cutting trees. Telegraph company.*

A telegraph company is liable, if its laborers, clearing its right of way, cut trees on adjoining land of another, although done contrary to the positive orders of the superintendent, if it resulted from the negligence of the latter in absenting himself, and intrusting the work to ordinary laborers, without supervision. *Clay* v. *Telegraph Co.*, 406.

4. *Highways. Jurisdiction of supervisors. Right of way. Telegraph line.*

Boards of supervisors cannot grant to a telegraph company a right of way along the *margin* of a highway. It can confer no right outside the limits of the highway itself. *Ib.*

TENANT IN COMMON.

Partition of personalty. Trustee. Code 1880, § 2580.

After condition broken, a trustee in a deed of trust conveying an undivided interest in personalty, has such interest as will entitle him to maintain a suit for partition of the property under § 2580, code 1880, which provides that "any tenant in common of personal property" of less value than $150 may obtain partition thereof before a justice of the peace. *Porter* v. *Stone*, 291.

THREATS.

Murder trial. Evidence of previous difficulty.

On a trial for murder, evidence of a previous assault by the deceased on the accused is incompetent, in the absence of evidence that it was connected with or related to the fatal rencounter, or that such previous assault was the result of enmity or threats of violence by deceased against the accused. And wherever the fact of a former difficulty may be proved by the state, the accused should be permitted to show its character. *Foster* v. *State*, 755.

TORT.

Damages. Implied from tort. Instruction.

In an action of tort, it is error to instruct that if plaintiff has failed to prove any "damages, either actual or possible, the verdict should be for defendant." The law implies damages for every wrong. *Rose* v. *Railway Co.*, 725.

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TREES.

1. *Cutting. Liability. When size immaterial. Instruction.*

A telegraph company trespassing in clearing a right of way, will be liable for cutting trees, although the evidence shows that those cut were small, in no case exceeding six or eight inches in diameter; and it is error, in instructions, to allude to them as shrubs or undergrowth. *Clay* v. *Telegraph Co.*, 406.

2. *Public highways. Width. Right of way. Telegraph line.*

Public roads are required to be opened and worked to a width of at least ten and not more than thirty feet. A telegraph company, given the right of way for its line along such a road, is not justified in assuming that there is a uniform legal width of thirty feet, and that it has the right to cut trees anywhere within fifteen feet of the center. It must be governed by the actual width of the road. *Ib.*

TRESPASS.

1. *Master and servant. Cutting trees. Telegraph company.*

A telegraph company is liable, if its laborers, clearing its right of way, cut trees on adjoining land of another, although done contrary to the positive orders of the superintendent, if it resulted from the negligence of the latter in absenting himself, and intrusting the work to ordinary laborers, without supervision. *Clay* v. *Telegraph Co.*, 406.

2. *Cutting trees. Liability. When size immaterial. Instruction.*

The telegraph company so trespassing, will be liable as for cutting trees, although the evidence shows that those cut were small, in no case exceeding six or eight inches in diameter; and it is error, in instructions, to allude to them as shrubs or undergrowth. *Ib.*

TRIAL.

1. *Presence of accused. Code* 1892, § 2391. *Constitutionality.*

The constitutional provision that one accused of crime shall be confronted by the witnesses against him, requires that all evidence, whether of living witnesses or inanimate objects, be produced before the jury in the presence of the accused and the court. Section 2391, code 1892, to the extent that it authorizes a jury, in a criminal case, to visit the scene of the offense unaccompanied by the accused or the court, is unconstitutional. *Foster* v. *State*, 755.

2. *Same. Jury; visiting scene of homicide. Case.*

Accordingly, where a homicide occurred in a railway-coach, and, pending the trial for murder, the jury visit the scene, accompanied by the ac-

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cused, but the latter is prevented by the officer from entering the coach with the jury, this is a denial of his constitutional right to be present when evidence is introduced, notwithstanding the jury remains in the coach only two or three minutes, and it is only for a part of this time that the accused is excluded. *Ib.*

TROVER.

1. *Pleading. Evidence. Description of property.*

While the same particularity of description of the property in trover is not required as formerly, it still is necessary that the *res* for the conversion of which the action is brought, shall be at least generally described in the declaration and identified by the evidence. *Bank* v. *Montgomery*, 550.

2. *Same. Insufficient identification of property. Case.*

In such action, where the declaration alleges the conversion of an entire stock of merchandise, consisting of numerous and different kinds of articles, and the evidence shows the conversion of only part of the stock, without designation of the quantity, character or class to which the converted articles belong, plaintiffs are not entitled to a verdict, and an instruction for defendant is proper. *Ib.*

TRUST.

1. *Tax-sale. Who may buy. Obligation to pay the taxes.*

A creditor who has previously charged the account of his debtor with the taxes due on the latter's land, and has come under obligation to pay them, cannot acquire a tax-title at the sale for such taxes. *Faison* v. *Johnson*, 214.

2. *Void sale under execution and mortgage. Purchaser a trustee.*

A judgment creditor, under obligation to pay his debtor's taxes, and who also held a trust-deed covering his debtor's land, caused the same to be sold under an execution issued after the debtor's death, and without revivor against the heirs, and, on the same day, sold under the trust-deed and suffered a sale for taxes, becoming the purchaser at all three sales, intending to concentrate the titles in himself. The debt secured by the trust-deed was shown to be in large part satisfied. *Held*, the creditor was rightly decreed a trustee of the title for the heirs. *Ib.*

3. *Power. Appointment of trustee. Personal trust. Void sale.*

A power conferred on a beneficiary in a trust-deed to appoint a trustee, should the person named die, or be unwilling to act, is personal, and cannot be delegated; and where, under such power, an agent of the beneficiary assumes to appoint a trustee, a sale made by him will confer no title, either legal or equitable. *Hartley* v. *O'Brien*, 825.

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4. *Trustee's sale. Ministerial acts by others. Approval of trustee.*

The personal attendance by the trustee, at a sale of land under a trust-deed, is not essential. He may act through others in advertising and making the sale. All that is necessary is, that the terms of the trust-deed shall be complied with as to this, and that the trustee shall approve the sale and execute a deed. *Dunton* v. *Sharpe*, 850.

5. *Same. Agent of trustee. Bidding for purchaser. Validity of sale.*

The fact that the representative of an absent trustee, who advertises and makes the sale under a trust-deed, is empowered to bid a fixed sum for the purchaser, and does so, will not incapacitate him from making the sale, especially where it appears that, but for this, the land would have sold for less. *Ib.*

6. *Same. Title acquired. Prior purchase at tax-sale.*

Title to land acquired at a trustee's sale will not be affected by the mere fact that, prior to such sale, after default by the grantor in the trust-deed, the purchaser had bought the land at a tax-sale. *Ib.*

7. *Same. Sale in pais. Good faith. Impartiality. Case.*

While holding that the utmost good faith and impartiality must characterize the execution of a power of sale *in pais* under a trust-deed, on the facts of this case, the court refuses to set aside such a sale, without reference to complainant's delay in seeking to vacate it. *Ib.*

TRUST-DEED.

See MORTGAGES AND TRUST-DEEDS.

ULTRA VIRES.

1. *Subscription to railroad. Extension of time. Varying contract.*

Where, under a proposition for the completion of a railroad by a certain time, a municipality voted to issue bonds in aid thereof, an extension of time to complete the road, granted by the municipal board, is of no validity, because of its want of power to materially vary the contract authorized by the vote. *Clark* v. *Rosedale*, 542.

2. *Private corporation. Power of directors. Consolidation.*

In the absence of authority conferred by their charters, an agreement between the directors of two corporations to consolidate and merge them into a new corporation is *ultra vires*. *Greenville Compress* v. *Planters' Press*, 669.

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3. *Void agreement. Part performance. Remedy.*

Although such invalid agreement has been partly performed, no action will lie on the agreement itself, nor can it be specifically enforced, but, to the extent that one of the corporations has received a benefit from its partial execution, the other, by proper proceedings, may recover of it. *Ib.*

UNLAWFUL DETAINER.

1. *Trust-deed. Defense. Failure to pay privilege tax. Code* 1880, § 589.

Where plaintiff, in an action of unlawful detainer, claims by virtue of a sale under a trust-deed, defendant can defeat a recovery by showing that he gave plaintiff the trust-deed to secure a debt contracted with him while he was conducting business as a merchant without having paid a sufficient privilege tax, whereby, under § 589, code 1880, the contract was void; and the defendant in such case need not pay or tender the amount due, as he would be required to do on seeking affirmative relief in equity. *Williams* v. *Simpson*, 113.

2. *Remedy. Trust-deed. Purchaser. Code* 1880, § 2645.

The purchaser of land at a sale, under a trust-deed on default, is entitled, as against the grantor, who withholds possession, to maintain the action of unlawful entry and detainer provided by § 2645, code 1880. *Marks* v. *Howard*, 445.

VAGRANCY.

Appeal to circuit court. Justice of the peace. Code 1892, § 1323.

One charged with vagrancy and required by a justice of the peace to give bond for good behavior or be committed to jail, under § 1323, code 1892, may appeal to the circuit court. *Jones* v. *State*, 398.

VARIANCE.

1. *Chancery practice. Charges of fraud. Evidence confined to issue.*

Creditors attacked an assignment, averring that certain debts therein preferred were simulated, and were inserted for the purpose of defrauding them. They also alleged generally that the assignment was fraudulent and void. The allegations were denied. The chancellor at the hearing, decreeing for defendants, declined to consider any evidence of fraud other than that relating to the genuineness of the preferred debts, although there was no objection to the introduction of testimony. *Held*, proper. *Richardson* v. *Davis*, 219.

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2. *Practice. Failure to object. Waiver.*

Where there was a variance between the declaration and the evidence, no objection being made on that ground, and an amendment would have been allowable, so as to conform the pleadings to the evidence, after verdict for plaintiff, the defendant, on appeal, will be held to have waived the objection, though the variance would have been fatal on timely objection. *Railroad Co.* v. *Cathey*, 332.

VENDOR AND VENDEE.

1. *Defects of title. Bona fide purchaser. Notice to attorney.*

A purchaser of land, having a bond for title, is chargeable with notice of an adverse claim thereto received by his agent or attorney who files for him a bill for specific performance, and who pays the purchase-money, and procures the deed. *Edwards* v. *Hillier*, 803.

2. *Estoppel. Void sale by trustee. Discharge of incumbrance.*

Where a husband, having conveyed land to a trustee to hold in trust for his wife, afterwards, under alleged authority from the trustee, makes an unauthorized sale thereof, the mere fact that he applied a part of the purchase-money to discharge an incumbrance on the property made by the wife, will not estop her to recover the land. *Ib.*

3. *Chancery pleading. Affirmative defense. Cross-bill. Subrogation.*

In such case, the extent of the purchaser's right, if any, is subrogation to the claim of the incumbrancer, but, on a bill by the wife to cancel his claim, the right to subrogation, being affirmative, must be asserted by cross-bill. *Ib.*

4. *Conveyance of land. Subsequently acquired title of grantor. Estoppel.*

Where one, owning only an undivided interest in land, conveys it by a deed purporting to pass the entire interest, and afterwards acquires the interest of his co-owner, the title thus acquired inures *eo instanti* to his grantee; and it makes no difference that his deed to the purchaser contained a misdescription of the land, this having, meantime, been corrected by decree. *Ib.*

VERDICT.

1. *Peremptory instruction. When refused. Evidence to warrant verdict.*

Where the evidence is sufficient to warrant a verdict for the plaintiff in any view of it which may be legally taken, it is proper to refuse a peremptory instruction to find for the defendant, and a verdict for the plaintiff will be sustained. *Railroad Co.* v. *Beehms*, 11.

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2. *Supported by evidence. When not set aside.*

If a verdict is supported by evidence, and the court cannot say the jury was unwarranted in reaching a conclusion, it will not be disturbed, although a finding for the opposite party would have been more satisfactory to the court. *Railroad Co.* v. *Cantrell*, 329.

WAIVER.

1. *Landlord's lien. Separate note for supplies.*

The taking by the landlord of a separate note for the price of mules supplied to his tenant to make a crop, the note reciting that he retained his lien on the mules and crop until the note is paid, is not a waiver of the landlord's lien. *Trimble* v. *Durham*, 295.

2. *Practice. Variance. Failure to object.*

Where there was a variance between the declaration and the evidence, no objection being made on that ground, and an amendment would have been allowable, so as to conform the pleadings to the evidence, after verdict for plaintiff, the defendant, on appeal, will be held to have waived the objection, though the variance would have been fatal on timely objection. *Railroad Co.* v. *Cathey*, 332.

WILL.

1. *Legacy. Charge on estate. Case.*

A will contained the following provisions: "I give and bequeath to my step-daughter, out of my estate, so soon as she attains the age of sixteen, the sum of $1,200, and desire that my wife, as trustee for her, shall loan said sum after that time, until my step-daughter marries; then the same to be delivered to her." Another clause provided that the residue of the testator's estate, real, personal and mixed, should go to his wife and son, according to the laws of descent. *Held*, the legacy to the step-daughter was made a charge on the entire estate. *Peebles* v. *Acker*, 356.

2. *Same. Enforcement of legacy. Purchaser.*

The charge created by such legacy on land of the estate may be enforced by the assignee of the legacy, against one who has purchased the land at trustee's sale, under a trust-deed executed by the heir and devisee of the testator. *Ib.*

3. *Limitations. Enforcing legacy. Administration. Purchaser.*

Where a legacy is made a charge on the estate of the testator, and certain land of the estate is sold by the heir and devisee, pending administration on the estate and before final settlement, the statute of limitations does

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not run against the right to enforce the legacy as to the land so held by the purchaser. So held in this case, there being no question involving the right of the purchaser to hold by adverse possession. *Ib.*

WITNESS.

1. *Impeachment of witness. Certainty. Practice.*

In laying the predicate for the impeachment of a witness, he should be apprised of the time, place and persons present when the supposed conversation took place; and, on the examination of the impeaching witness, he should be confined to the inquiries propounded in the predicate, and should not be asked or permitted to state generally what took place on the occasion inquired about. *Bonelli* v. *Bowen*, 142.

2. *Witness against estate. Code* 1880, § 1602. *Surviving partner.*

On exceptions to the account of an administrator, a surviving partner of the intestate is a competent witness to prove the correctness of an open account in favor of the partnership against the deceased partner, which had been paid by the administrator on an accounting. He is not testifying to establish his own claim against the estate within the meaning of § 1602, code 1880. *Jones* v. *Warren*, 227.

3. *Instruction. Aimed at witness. Uncontradicted testimony.*

Where the testimony of the only witness for defendant is uncontradicted, and not improbable or unreasonable, it is error to give an instruction, at the instance of plaintiff, that if any witness has knowingly testified falsely in a material matter, the jury may disbelieve him. *Railway Co.* v. *Tate*, 348.

4. *Competency. Estate of decedent. Code* 1892, § 1740.

Complainants are incompetent witnesses to establish their own claim as devisees of the original owner of lands against persons who claim under a conveyance from such original owner. *Neblett* v. *Neblett*, 572.

5. *Cross-examination. Interest in result.*

In an action of ejectment for a strip of land, depending upon the location of a disputed boundary line, in order to show the interest of a witness, it is competent, on cross-examination, to prove that he has an agreement to fix the boundary line between defendant's land and his own according to the result of the suit. *Archer* v. *Helm*, 874.

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